24008

National Library of Canada | Bibliothèque nationale du Canada | CANADIAN THESES ON MICROFICHE | THÈSES CANADIENNES SUR MICROFICHE

NAME OF AUTHOR/*NOM DE L'AUTEUR* PETER DEVONSHIRE

TITLE OF THESIS/*TITRE DE LA THÈSE* Law and Morality in Contemporary Society: The Constant Challenge to Jurisprudence

UNIVERSITY/*UNIVERSITÉ* University of ALBERTA

DEGREE FOR WHICH THESIS WAS PRESENTED/ *GRADE POUR LEQUEL CETTE THÈSE FUT PRÉSENTÉE* MASTER OF LAWS

YEAR THIS DEGREE CONFERRED/*ANNÉE D'OBTENTION DE CE GRADE* 1975

NAME OF SUPERVISOR/*NOM DU DIRECTEUR DE THÈSE* PROF. D.R. PERCY

Permission is hereby granted to the NATIONAL LIBRARY OF CANADA to microfilm this thesis and to lend or sell copies of the film.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

L'autorisation est, par la présente, accordée à la BIBLIOTHÈQUE NATIONALE DU CANADA de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans l'autorisation écrite de l'auteur.

DATED/*DATÉ* 27 March 1975 SIGNED/*SIGNÉ* P Devonshire

PERMANENT ADDRESS/*RÉSIDENCE FIXE* #206 College Plaza, Tower One, 11135-83 Avenue, Edmonton, ALBERTA

NL-91 (3-74)

THE UNIVERSITY OF ALBERTA

LAW AND MORALITY IN CONTEMPORARY SOCIETY: THE CONSTANT CHALLENGE TO JURISPRUDENCE

by

© Peter Devonshire

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF LAWS

FACULTY .....LAW.....

EDMONTON, ALBERTA

SPRING, 1975

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled ...LAW AND MORALITY IN CONTEMPORARY SOCIETY: THE CONSTANT CHALLENGE TO JURISPRUDENCE.....

submitted by ...Peter Devonshire.....

in partial fulfilment of the requirements for the degree of Master of ...LAWS.....

D.R. Percy
.....
Supervisor

.....

.....

Date 14 March 1975

TO MY PARENTS

ABSTRACT

In order that society may adequately operate as a viable unit, two fundamental issues must be reconciled. Firstly, a co-operative system of existence is not possible unless there is protection from attack upon its basic values. Secondly, although certain personal freedoms are relinquished to the collective necessities of community life, the individual cannot be expected to surrender every aspect of his thought and conduct to public scrutiny. A tension thus arises between the rights of society on the one part, and those of the individual on the other. In essence, the proponents of a liberal thesis, such as John Stuart Mill and Professor H.L.A. Hart, emphasise the rights of the latter, whilst the advocates of a coercive model such as Sir James Fitzjames Stephen and Lord Devlin, emphasise the rights of society as a whole. The critical point of contact occurs when the State seeks to prohibit questionable conduct, principally by means of the criminal law. Whilst both schools would recognise that certain basic constraints should be observed, such as respect for life and property, there still remains fundamental disagreement as to the legal status of such nebulous areas as obscenity, indecency and corruption. When the law acts in these latter instances it is applauded by those who subscribe to a coercive system, as being necessary and even beneficial, but from the libertarian perspective it receives bitter condemnation.

The resolution of this controversy requires a clear statement as to the function and purpose of the criminal law and the moral basis upon which social needs and prejudices may validly find expression. Accordingly, there is a need to define when certain acts may be subject to passive censure and when public disapprobation may legitimately extend beyond this and attach to impugned conduct the somewhat protean label of being a crime.

ACKNOWLEDGMENT

It is with pleasure that I record my gratitude to my tutor Professor David R. Percy, Director of Graduate Studies, Faculty of Law, University of Alberta. I am deeply indebted to Professor Percy for his constructive and formulative criticisms and for his many valuable comments throughout the writing of this thesis. Professor Percy's perceptive appreciation of the field of Jurisprudence has been a constant source of inspiration to the writer.

I would also like to express my thanks for the kind assistance rendered by the staff of the Weir Law Library, Law Centre, University of Alberta.

TABLE OF CONTENTS

CHAPTER		PAGE
1	INTRODUCTION	1
2	THE LIBERTARIAN SCHOOL	10
	The Ouimet Report	10
	The Wolfenden Report	14
	John Stuart Mill	20
	(a) Freedom of belief	21
	(b) Freedom of action	25
	The role of morality in Mill's thesis	27
	Qualifications to Mill's doctrine	32
	H.L.A. Hart	50
	Hart's concept of Paternalism	52
	Hart's analysis of legal punishment	57
	(a) Enforcement as coercion	57
	(b) Enforcement as punishment	58
3	THE ENFORCEMENT OF MORALS	62
	James Fitzjames Stephen	62
	(a) Liberty in general	62
	(b) Liberty of thought and discussion	69
	(c) Liberty in its application to morals	75
	Lord Devlin	83
	1. Devlin's general statement of principle	84
	2. Detailed criticisms of Devlin's theory	92
	(a) The point of legal intervention: the criterion of intolerance	92
	(b) The inflexibility of an enforcement of morality doctrine	98
	(c) The contemporary social reality	101
	(d) The Hart-Devlin dialogue	103
4	THE ISSUE OF JURIDICAL CERTAINTY	114
5	CONCLUSION	141
	1. Some perennial problems in the area of law and morality	141
	(a) Definitional problems	141
	(b) The difficulties of ascertaining a collective opinion	143
	(c) Ought law to lead or to follow?	147
	(d) Internal value conflicts	152
	(e) A narrowing of points of conflict	153

2. The arguments in perspective
(a) The libertarian case 156
(b) The enforcement of morality 156
(c) Conclusion 160

FOOTNOTES 165

BIBLIOGRAPHY 171

. 179

CHAPTER ONE

INTRODUCTION

In this thesis it is proposed to examine an age old controversy which remains of profound contemporary significance, namely the relationship between law and morality and the extent to which one affects, controls or complements the other. Freedom of thought and freedom of action, the enforcement of morality and particularly the role of the courts and legislation in these areas, with the limits of their useful interference, will be principal subjects of discussion. This nevertheless remains an extremely wide topic and must be narrowed further to bring the precise issues into focus.

It is seldom disputed that certain aspects of conduct are socially harmful and must accordingly be proscribed by the criminal law, whilst other conduct clearly has no social implications and is left to the discretion of the individual. These areas will be respectively called public morality and private morality. This thesis is concerned with the nebulous area where these two elements overlap, where it is uncertain whether particular conduct should be governed, if at all, by purely social pressures (for example, the disapprobation of the community in the form of social ostracism or active persecution) or whether it should rightfully come within the ambit of the criminal law. Such an inquiry is beset with conceptual

difficulties, and it is here that the proper scope and function of the criminal law is most in need of clear definition.

It will be asked whether private morality should be enforced by the criminal law and if so, to what extent the law should embody a moral content. This again is so broad a topic that only a few of the more influential texts may be taken as being representative.

In Chapter 2 an examination of the liberal school will be initiated with a review of two fairly recent Commissions, which have sought to confront particular problems in this area from the standpoint of law reform.

The Canadian Committee on Corrections (Ouimet Report)[1] was established in June, 1965, and submitted its findings to the Solicitor General of Canada on March 31, 1969. Its terms of reference were[2]

> To study the broad field of corrections, in its widest sense ... and to recommend ... what changes, if any, should be made in the law and practice relating to these matters in order better to assure the protection of the individual and, where possible his rehabilitation, having in mind always adequate protection for the community ....

In its general statement of policy, the Committee was concerned to emphasise the need to limit the scope of criminal responsibility to those instances where there are no alternative measures for controlling anti-social behaviour.

The Committee on Homosexual Offences and Prostitution (Wolfenden Report)[3] was appointed in August, 1954 to

consider[4]

> (a) the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts; and
> (b) the law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes ....

Its report was presented to the United Kingdom Parliament in September, 1957. This Committee similarly postulated a restrictive role for law and emphasised that there is a sphere of private morality where individual freedom of choice and action supersedes any interest the State may claim in either a person's welfare or the general welfare of the community.

At a practical level these Committees seem prompted by a philosophical approach similar to that of John Stuart Mill in his treatise "On Liberty"[5] which represents a powerful plea for individual freedom on the basis that it is conducive to the well-being and advancement of society.

Professor Hart's defence of the libertarian ethic in "Law, Liberty and Morality"[6] will also be discussed together with his specific observations on Mill and his critics. One of the more important views to emerge from Professor Hart's critique was his willingness to concede the existence of paternalism as a modification to Mill's doctrine; this will be pursued to ascertain whether in fact the two are reconcilable.

In the third chapter, under the heading "The Enforcement of Morals", the converse proposition will be examined, namely that both public and private morality are properly

referable to the legal process. This section will be viewed particularly through the writings of Sir James Fitzjames Stephen[7] and Lord Devlin.[8] The main aspects of their theses that will be considered, may be briefly outlined here.

Stephen regards coercion as being the most effective means of securing social advancement; for him, morality is and must be a "prohibitive system" one of the main objects of which is to impose a desirable standard of conduct, which would not prevail in the absence of such constraints. Thus, he takes a similar view to Lord Devlin in that he not only sees law as fulfilling an important function in relation to immorality but he also asserts that all governments operate upon a moral basis.

Lord Devlin's basic premise is that the defining quality of a society is that it is a community of collective ideas.[9] Therefore, fundamental to his viewpoint is the notion that society can and should use the law to enforce its moral judgments, and hence it has a right to legislate against immorality as such.

An affirmative response to the question of whether morality should be enforced by law presents various contingent issues which fall to be resolved if this approach is to be tenable. The major ones are, firstly, how does one evaluate the actual moral content which the law should adopt? Secondly, from what standpoint does one elicit the moral standards which are to be used? There is a strain running through several of the important writings under examination,

which supports an objective standard, or that of the so-called reasonable man. This in turn raises the question of whether, for practical purposes there exists a social moral consensus, and if so, whether it can be effectively identified with sufficient particularity to be translated into actual offences. These and other related matters will be discussed, not only for the purpose of determining the validity and consistency of the enforcement of morality theories but also to evaluate their merit relative to the libertarian school.

In the final substantive chapter there will be an examination of the issue of legal certainty, with particular emphasis on the extent to which this is considered necessary in present social contexts and on the demands which it imposes upon the legislative and judicial functions. The judgments of the House of Lords in Shaw v. D.P.P.[10] and Knuller (Publishing, Printing and Promotions) Ltd. v. D.P.P.[11] are taken as practical illustrations of contemporary judicial thought in this area. An approach similar to that of the enforcement of morality school underlay these decisions and as a consequence their Lordships' opinions will serve to indicate in practical terms some of the strengths and weaknesses of the enforcement school.

It will be argued that one of the more noticeable drawbacks to emerge is that a considerable degree of uncertainty is encountered at the level of implementation. Various aspects of the issue of juridical certainty will accordingly receive vigorous examination.

The decisions in Shaw v. D.P.P. and Knuller v. D.P.P.

served to affirm emphatically that a conspiracy to corrupt public morals remains a criminally punishable offence; this has cast an interesting and provocative light on the area of law and morality. Adjudication of conduct not specifically covered by legislation or precedent appears at first instance to leave the role of the English criminal law in a nebulous and possibly arbitrary state. The ramifications of this will be examined, particularly with reference to the fundamental criticism that this trend in the criminal law involves the imposition of a legally organised punishment without having created a specific crime. The implications of this will be considered, together with a discussion as to where, in the last analysis, the role of the criminal law really lies.

Chapter 5 will contain firstly, a summation of the general problems attendant to this debate and secondly, a brief review of each school, followed by some personal opinions in support of the enforcement of morality doctrine and its preferability over the libertarian approach.

At this stage, a few general comments must be made by way of a preliminary explanation, to be borne in mind when evaluating the detailed approaches in the following chapters.

It is important to remember that the criminal law proceeds from the simple premise that what it does not forbid, is permitted; it is essentially a negative position - in the absence of a criminal sanction, a person is free to act as he wishes. On the other hand, other non-legal

sanctions may operate to prevent conduct which is not in itself unlawful, and thus public opinion is of considerably wider application than the law. Law and morality coincide only where an act, popularly regarded as wrongful, is also prohibited by the legal process. However, three refinements must be added to this. Firstly, the prevalent moral dictates of the community are undoubtedly a restraining influence upon the law insofar as the latter may fall into disrepute if it becomes generally inconsistent with the former. Conversely, law reform will often be prompted by current trends, after the climate of popular feeling, as well as opinions within the legal profession itself, have been sounded out through Law Reform Commissions, Parliamentary debates and the like.

Secondly, both the government and the judiciary may reflect morality negatively without proscribing in the positive sense that which is considered unacceptable. Thus, Stephen cites as an example of passive coercion, the refusal by government bodies to financially assist those religious schools of which it disapproves.[12] Further, traditionally at common law, the courts have not been prepared to enforce contracts which have arisen ex turpi causa, or which are considered to be contra bonos mores.[13] In this way morality exerts a vital but indirect influence on legal reasoning in various decisions.

Thirdly, whilst it is generally agreed that at the most basic level, law is concerned with restraining conduct

which is regarded as socially harmful, this concept of social harm is itself plagued with disturbing ambiguities. The process of balancing individual rights against the rights of the community invariably becomes confused, for it is often not possible to draw a precise line of demarcation between the two, and it is here that the controversy becomes most heated. It must be remembered that the status of these conflicting interests will depend upon which conceptual approach is adopted: the libertarian desires that the frontiers of legal interference should be pushed back to be superseded by individual discretion; but it seems that such freedom will only be worthwhile if either the individual is best capable of knowing his own interests, or alternatively, if he does not, it must be shown that any interference is intrinsically wrong. Further, if any form of personal compulsion is to be eschewed, then it must be asked if it is a necessary implication that a person should be free also to harm the welfare and interests of others, and upset the basis of collective co-operation upon which society is based. If on the libertarian model, this corollary is not to be adopted, then this leaves open the difficult problem of ascertaining on what basis the public and private spheres are to be segregated. The answers to these and similar questions then, are some of the more important issues to be resolved in an analysis of this doctrine.

The proponents of the enforcement of morality are also directly concerned with the confrontation of the rights of

the individual and those of society, although in this situation the matter is being approached from the opposite direction. It is generally argued here that society exists within the framework of a moral structure which requires staunch protection, and hence its need for the formal support of a coercive system. This, in essence is their argument and in reviewing this school it must be asked whether, finally, their case has been made out satisfactorily to justify the role for the legal system which they have postulated.

CHAPTER TWO

THE LIBERTARIAN SCHOOL

The first of the two principal areas under review, namely the libertarian school will now be examined. By way of preliminary observation it may be said that the crux of this thesis centres upon the permissible degree of individual liberty within society, and that this discussion can be viewed on two levels. Firstly, it may be approached on the practical level where ideas are intended to be translated into actual reforms of the legal system, for example, legislative proposals adopted by Law Reform Commissions. Secondly, there is the philosophical plane, which although academic by definition, often in fact provides a theoretical basis for provoking new responses and attitudes towards legal and social change. These two areas will now be discussed in turn.

In recent times, there has been a discernible trend towards lessening the scope and function of the criminal law, with a corresponding extension of individual discretion in matters of conduct and taste. Two significant views representing this at the practical level, emerge from the Ouimet Report[14] and the Wolfenden Report.[15]

The Ouimet Report

The Report of the Canadian Committee on Corrections (Ouimet Report), in formulating broad guidelines for the area of criminal responsibility, felt that to designate

certain conduct as criminal in an attempt to control antisocial behaviour should be a last step. The sanctions imposed by the criminal law, whether in the form of arrest, summons, trial, conviction, punishment or publicity, should, the Committee suggested, only be employed as an unavoidable necessity. It should be borne in mind that much antisocial behaviour is kept in check by social agencies other than the police and the courts. Accordingly, the Committee adopted certain specific criteria as indicating the proper scope of the criminal law. Principally these were:[16]

1. No act should be criminally proscribed unless its incidence, actual or potential is substantially damaging to society.
2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of conduct. Other kinds of behaviour may be more appropriately dealt with by non-criminal legal processes, for example by legislation relating to mental health or social and economic condition.

The criminal law is cited quite emphatically as a last resort. State interference is only to be preferred where manifest evil would otherwise occur; in weighing the alternatives it should be asked "whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes".[17]

Realistically, the motives for obedience to accepted norms of behaviour are ascribed not only to fear of legal punishment but also to loss of social and economic status; attitudes are effectively conditioned by family and general

environment rather than by isolated legal sanctions, which because of their limited significance, did not find favour with the Committee as being a desirable coercive force.

It may be further noted that the Committee extends its stated principle of protection to the actual offender himself so as to prevent the infliction of correctional measures against convicted persons "too harshly or for too long." It has been remarked[18] that the Committee's desire is to protect the offender only, without any intention to do him good. Interestingly, this seems to follow Mill's dictum that the individual's own good is never a sufficient warrant for interference. On the other hand, without resorting to semantic distinctions, it would certainly appear that the prevention of harsh or excessive punishment is, in a broad sense, based upon a desire to protect an individual's welfare, at least up to this point.

The Committee cites murder, rape, assault and theft as crimes not requiring extensive justification because manifestly the consequences to the victim are serious and there is often objective proof of damage. However, what of common drunkenness, it asks? Neither of the above-mentioned justifications exists, and the welfare of the individual assumes significance whilst direct prejudice to the community ceases to be an operative factor. No direct answer to this problem is forthcoming, but perhaps here one may attempt to extrapolate the Committee's broad guiding principle and anticipate which approach it would be likely to take. Their

essential argument is that if substantial harm to society may follow from a particular act or practice, then it should be subject to legal restraint. In the absence of this condition any doubt should operate in favour of the accused. Theoretically then, it seems that drunkenness should not enter the criminal category.

However, perhaps one may further respond to the example of common drunkenness by pointing out that the Committee is laying down broad guidelines only and that there are in fact many less important offences which will not fulfil these principles but which it is expedient to control, such as the dropping of litter in the street. They are based simply on the premise that most people would think it desirable that they be restricted. Thus the presence of drunkards wandering abroad may not in itself he harmful, but it would most likely meet sufficient disapproval to justify legal prohibition.

It must be stressed that this conclusion finds no basis in the Ouimet Committee's stated principles, it is quite extraneous to them and is merely asserted here as a rationalisation of those many areas which do not appear to be governed by the criteria which they prescribe.

However, the Committee's principles would find more vigorous application in situations where the punishment threatened is severe either in its actual sentence or in its effect in labelling particular conduct as criminal - the death penalty or a long period of imprisonment is an

example of the first, and the designation of certain sexual behaviour as unlawful, is an example of the second.[19]

It may be suggested therefore, that the Committee is clearly cognisant of the implications of the criminal process and that it is on principle proposing a more limited role for Canadian criminal law than it has thus far played. Significantly though, in a later discussion on Corrections,[20] whilst the principle was recognised that interference with the individual's freedom should be kept to a necessary minimum, it was concluded that in the last analysis "The prevailing principle must be the ultimate protection of society". It would accordingly seem unwise to make any claims that the Ouimet Committee's approach is likely, in practical terms, to herald any liberal upsurge in the sphere of the criminal law.

The Wolfenden Report

The Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report) similarly postulated a restrictive role for the criminal law, and it was perhaps even more strenuous in expressing the need for limiting the scope of the criminal process, particularly emphasising[21] "the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality". Accordingly, in paragraph 61, a statement of policy was enunciated thus:[22]

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private

> morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

If one adopts this approach, then in the drunken man example discussed in relation to the Ouimet Report, his conduct should not be referable to the correctional process, at least insofar as it is not detrimental to the community.

If paragraph 61 seems at first glance to banish the criminal law from the field of morals, one should be mindful of the limitations expressed in paragraph 13 that[23]

> ... its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

It should be observed that the Committee draws an important distinction between public and private morality, which is central to their thesis, and indeed, the assumed basis upon which their theory rests. As was briefly mentioned in Chapter 1[24] public morality covers those areas where there is a public interest in conduct and behaviour due to its direct repercussions upon the community. It rests in its simplest form on the assertion that other persons may be

affected by it to their physical or moral detriment. Private morality concerns the agent only and relates to matters in which the public has no claim to be concerned. The distinction between the two cannot always be drawn with clarity or even without attendant controversy. It is suggested that a helpful test may be proposed, namely that of the "disinterested man" - would a disinterested person, not wishing to be concerned or involved with the conduct in question, be unduly affected by it, to his physical or moral prejudice? An affirmative answer would bring the matter within the sphere of public morality whilst a negative response would leave it within the area of private morality.

On this basis it may be concluded that the Committees proposals are largely intended to concede the sphere of private activity to personal discretion whilst the criminal law is left with a vital and necessary role in the area of public morality. Perhaps they did not sufficiently recognise that despite their theoretical division, these two aspects become inextricably mixed at the level of enforcement, where one is concerned least of all with academic niceties. To return to a previous example, one could envisage that in an age of rigid moral conservatism, common drunkenness could become regarded as a sinful act severely offensive to the existing moral climate. In fairness it should be clarified that on the Committee's principles, drunkenness itself could could never be an offence <u>simpliciter</u> merely because other people thought that it was wrong. There would have to be

at least a public manifestation of such conduct causing offence to the witnesses. A reaction of disgust based upon the knowledge that people are getting intoxicated in private would not in itself be sufficient for legal interference.

Subject to this limitation, one could foresee perhaps quite rigorous criminal punishment mirroring the popular sense of intolerance at such acts. Its function here can be justified on the basis cited by the Wolfenden Committee as preserving "... public order and decency, to protect the citizen from what is offensive or injurious ...." (paragraph 13)[25] In another age, perhaps when the pendulum has swung in the other direction, releasing the law from such exacting standards of probity, the same act may now be regarded in an entirely different perspective - to proscribe common drunkenness through the judicial process might be regarded as infringing upon what should rightly be regarded as the "personal and private responsibility of the individual for his own actions ... which a mature agent can properly be expected to carry for himself without the threat of punishment from the law." (paragraph 61).[26]

It is for this reason that general principles only become meaningful when applied to specific alleged offences. This the Committee has done in relation to homosexuality and prostitution, but in respect to every other range of social activity this broad doctrine can be of limited utility other than as a doctrinal banner to which subsequent

liberal reformers may rally.

Although both Committees postulate a restrictive use of legal coercion, the effective difference between them lies not so much in the result as in the underlying reasoning. The Ouimet Report emphasised the severe implications of declaring an act to be criminal and urged that all other viable alternatives should be explored first before resorting to this ultimate solution. Whereas, the Wolfenden Report was more concerned to show that there is a point beyond which the law has no authority to go, and that it may not intermeddle in what they termed the realm of private morality. However, in establishing these principles, it is apparent that both Committees have set out tests of a rather indeterminate nature. In truth, their general rules do not offer specific solutions to actual problem areas such as drug taking. Further, such vital concepts as "social harm" are susceptible of interpretations equally attractive to the despot and the advocate of total <u>laissez faire</u>. Thus, the notion of "social harm" may be so attenuated as to include the pressures which drunkards and drug addicts impose upon medical services, public health and welfare organisations and the like. Or, conversely, "social harm" may be contracted to such dimensions as to concern only direct physical interference with others, without including any lesser forms of conduct, thereby excluding many of the rights, interests and duties which are indispensable for any cooperative basis of social existence. Thus, on the

narrowest definition of the concept, it is possible that a promise would not even be recognised as a binding source of obligation because its breach may have social, economic and political effects without causing actual physical harm to others.

The deliberations of these Committees provide an interesting contemporary background in practical terms against which to examine the philosophical writings of the liberal school. Accordingly, the theoretical aspect of the libertarian doctrine will now be considered. It is appropriate to begin with the writings of John Stuart Mill, whose treatise "On Liberty" has had an enduring impact upon subsequent legal and political thought since its publication in 1859. In juxtaposing Mill's theories with those of the Ouimet and Wolfenden Committees, there is a danger that a superficial examination might lead to the interpretation that these bodies endorsed Mill's views. Mill's doctrine urges toleration of the maximum possible individual freedom on the basis that it is conducive to the well-being and advancement of society, and it must be clarified that neither Committee in fact went this far. From their desire to limit the use of the criminal law, one cannot infer the corollary that personal freedom in morality is necessarily regarded as beneficial <u>per se</u>. Their approach is to examine the proper limits of the criminal sanction and they conclude that it cannot be sustained where other pressures may effectively prevail, or in areas that it

has no genuine right to enter. Mill, on the other hand is viewing the problem from an entirely different angle and is concerned to assert the virtue of liberty, which, he complains, is resisted and frustrated by various elements including inter alia, legislation and the criminal law.

John Stuart Mill

Mill expressed the general scope of his discussion as being "the nature and limits of the power which can be legitimately exercised by society over the individual."[27] It is necessary to articulate his broad doctrine in order to place his opposition to the enforcement of morality in some perspective.

For Mill there are two important antagonistic elements conducive to the development or retardation of political society: Liberty and Authority. He conceived that primitive communities required protection from the "tyranny of political rulers". This struggle gradually evolved from tyranny by political rulers to tyranny by the community itself over its minority elements under a system where the governors of the State ceased to exercise independent conflicting authority and became accountable to the will of the populace. Tyranny by the majority, he considers, may operate upon two levels, either at the hands of political functionaries, or by prevailing opinion and sentiment, for he observes that by the latter, "society can and does execute its own mandates". Any unwarranted encroachment upon individual liberty whether by government or prevailing opinion is

necessarily an evil. Accordingly, liberty is conceived as a bastion to be defended at all costs.

Why has this writer espoused the concept of individual freedom as requiring such vehement and passionate defence? The answer is best dealt with by making two primary divisions: (a) freedom of belief, and (b) freedom of action.

(a) Freedom of Belief

Firstly, to place his views into context, it may be said that Mill's doctrine enshrines what may at first sight appear to be an extremely liberal thesis, as illustrated for example by his belief that[28]

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.

It should be noted that in fact his modifications narrow this wide principle considerably; these will be discussed extensively in a later part of this chapter.[29]

Mill contends that the refusal by society to receive opinions transverse to current thought involves an assumption of its own infallibility and *a fortiori* denies absolutely the truth of dissenting views. There are three variants upon this theme.

Firstly, the opinions which society seeks to stifle may in the light of subsequent experience prove to be true. Mill cites the crucifixion of Christ as the ultimate example:[30]

> The man who left on the memory of those who witnessed his life and conversation such an impression of his moral grandeur that

> eighteen subsequent centuries have done homage to him as the Almighty in person was ignominiously put to death, as what? As a blasphemer. Men did not merely mistake their benefactor; they mistook him for the exact contrary of what he was ....

Yet, he comments, the perpetrators of this "lamentable transaction" were men who possessed the "religious, moral and patriotic feelings of their time" who in any age "have every chance of passing through life blameless and respected".

Mill refutes the dictum that truth always triumphs over persecution as being a "pleasant falsehood" but concedes that even if truthful opinions cannot be wholly extirpated, they may be thrown back for centuries, perhaps until an age when they are rediscovered and received without persecution.

Further, where the tyranny of the majority emerges in the form of social intolerance which "kills no one, roots out no opinions" men will nevertheless dissemble their views, or abstain from any active effort for their diffusion.

Where society refuses to receive opinions which may later appear to be true, the consequent harm is twofold. First, quite patently, the infusion of truth is retarded whilst false beliefs are sustained. Secondly, he asserts that a[31]

> ... large proportion of the most active and inquiring intellects find it advisable to keep the genuine principles and grounds of their convictions within their own breasts and attempt in what they address to the public, to fit as much as they can of their own conclusions to the premises which they have internally renounced ....

Who, he asks, can compute the loss to the world of "those with promising intellects combined with timid characters" who cannot pursue bold, independent reasoning for fear of denunciation as irreligious or immoral? Mental slavery of necessity stultifies individual thought - a situation clearly abhorrent to Mill.

Alternatively, he is opposed to any refusal by society to receive unorthodox beliefs, even where the accepted opinions of society may be true and dissenting arguments false. Mill questions the worth of opinions which are held "when their truth is not freely and openly canvassed". The essence of his objections to witholding free discussion is that without the stimulus of argument and the defence of truthful beliefs, they will only be held "as a dead dogma and not a living truth". Debate and criticism, he contends, even where false arguments assail the prevailing truth, imbue it with vitality and reason. Only when one knows that all objections have been satisfactorily answered is it possible to adhere to a belief with conviction; free discussion is a <u>sine qua non</u> to this ultimate rational assurance. What Mill terms "a lively apprehension of the truth" can only flourish where criticism provokes argument, for which understanding is but a basic equipment. When we fail to listen to, or remonstrate with, dissentients we start the process which Mill describes as "the decline in the living power of the doctrine".

These arguments are adumbrated by Mill in a passage

which is as lucid as it is succinct;[32]

> If the opinion is right, they are deprived of the opportunity of exchanging error with truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Further, if for example one upholds the Christian ethic as containing the eternal truth, Mill would nevertheless ascribe an additional value to the reception of contrary beliefs. They are, he feels, formulative elements in the content of Christian morality which has the nature of a "reaction" to them. In other words "Its ideal is negative rather than positive; passive rather than active ... Abstinence from Evil, rather than energetic Pursuit of Good". Put concisely, " ' thou shalt not' predominates unduly over 'Thou shalt' ".[33]

Even where there is a gradual narrowing of diversity of opinions, and beliefs begin to assume the nature of universal recognition, he laments the consequent loss of "so important aid to the intelligent and living apprehension of a truth as is afforded by the necessity of explaining it to, or defending it against, opponents ...."[34]

A third possibility is propounded which has a more realistic appeal, namely, that conflicting doctrines share the truth between them. Under this hypothesis, the non-conforming opinion is of value not only as a medium of discussion but is also of benefit in replacing that sector of public opinion which is found to be false with that which is

found to be true.

Mill concludes that the value of free discussion is paramount. As a result, he warns that such discussion should be not only free, but fair. When an opinion is subjected to persuasive attack the majority should not resort to "intemperate" measures, for example by misstating the elements of the case or utilising invective or sarcasm. Equality is essential, for otherwise popular opinion can fashion powerful weapons to negative unorthodox doctrines, the worst being to stigmatise the opposition as being immoral or bad. They thereby violate a standard which is termed "the morality of public discussion".

It follows from this discussion that liberty of thought can only be meaningful if one is free to act upon what is believed to be right; accordingly, if a case has been made out for freedom of conscience, there is a prima facie case for freedom of action also. The converse is similarly true, that if liberty of action is established, then a fortiori one should be free to formulate the opinions which support it.

(b) Freedom of Action

In his introductory chapter Mill enunciates the broad concept that individual liberty of action is sovereign, and in his classic dictum he states that[35]

> ... the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

What constitutes "harm to others" is given an essentially limited definition and is equated with physical harm or specific interference, although in one instance at least these criteria are exceeded, in the case of acts of indecency, which are said to constitute an offence against others. So generally, Mill formulated the principle which, as mentioned above,[36] is reflected in the Wolfenden Report, that a person should only be answerable in respect of actions clearly detrimental to the community rather than his own interests.

Accordingly, a sharp division is drawn between self regarding acts and those other regarding acts which are rightfully the concern of the community. As one critic has remarked,[37] Mill sometimes gives the impression that the distinction between the self regarding and the other regarding nature of an act is simply a question of fact. This is because society can afford to bear the inconveniences of merely indirect injury; such injury arises where no tangible damage is caused, but others are nevertheless affected by particular behaviour, such as blasphemous language uttered in a public place. But what is or is not merely an indirect or contingent injury in fact calls for a value judgment. Thus the distinction may be properly formulated as being normative rather than factual. It may be said therefore, that in creating a legally recognised crime, one is merely placing a factual definition upon an existing moral valuation. Further, it should be remembered

that the answer will depend not only on our values but also on the purpose for which the question is asked: there can be no immutable set of values as such. Thus a person may believe that it is wrong to kill animals, but were he cast in the wilderness without sustenance, necessity may force a compromise of his standards.

Against this background one is able to appreciate the importance placed upon liberty as a paramount virtue. The only "unfailing and permanent source of improvement" he asserts, is liberty, for each member of society is a potential "centre of improvement". Within this context, individuality stands at the forefront as an agency of progress: the greater the diversity within a given populace ex hypothesi the greater the possibility of social improvement. Accordingly, Mill readily castigates the motives of any community in enforcing its moral judgments; interference with personal conduct, he feels, is often simply due to disapproval of actions deviating from the norm. Yet these standards of judgment are "held up to mankind as the dictate of religion and philosophy". Therefore he condemns the insidious process whereby the majority improperly imposes its own preferences under the guise of moral laws.

The role of morality in Mill's thesis

It may be questioned whether Lord Devlin is correct to deduce from this that morality forms no part of Mill's doctrine. Devlin observes[38] that criminal law offences have the characteristics both of causing harm to others

and also of contravening the moral law. It is the first reason only, he claims, which on Mill's principle justifies the existence of the law. As a result of this, Devlin claims that Mill's theory is deficient in that it cannot permit the degree of moral guilt to be taken into account in assessing the measure of punishment. Thus, if moral guilt is not the law's concern, one should be punished for theft in the same way as for a parking offence. In reply to this specific allegation, it may be countered that irrespective of any moral issue, punishment in these cases would surely be graduated according to the degree of harm caused to the community. Furthermore, in practice the degree of moral guilt will be one of the important determinants of the gravity of offences and the severity of sentence; clearly the mere estimation of the harm done is not the sole factor. For example, suppose that two men stand before a court, each charged with stealing a loaf of bread. One of the defendants was destitute and starving at the time, whilst the other was not, and committed this crime without apparent motive. Here an identical offence has been committed, but it cannot be doubted that the situation of the first offender would be taken into account in mitigation of sentence. Thus, the gravity of the harm caused to society by these crimes is clearly not the only factor taken into consideration. This is in line with Mill's theory, as illustrated for example by his belief that a person who is considered to be potentially violent when inebriated, may be

placed under a personal restriction, namely the threat of an exemplary sentence if he again commits this type of offence.[39]

Devlin consolidates his position with the sweeping assertion that "On Mill's doctrine all immorality is extraneous". By this he means not only that for Mill all immorality is extraneous to the determination of what is to be deemed criminal but that morality is banished completely from Mill's model. If this is correct, then Mill's theory would be rendered unworkable.

It has already been shown that morality does in fact determine the gradation of offences and the particular degree of punishment in each case, and that this is consonant with Mill's theory. So now attention must be turned to this wider issue of whether morality is totally excluded from every other aspect of Mill's doctrine. It is submitted that Devlin's criticism may be effectively rebutted for the following reasons.

Firstly, at a fundamental level, it is suggested that morality is an integral part of any judicial and legislative decision making; it is the determinant of whether conduct is to be considered self regarding or other regarding.[40] It cannot be maintained that the dichotomy between the two depends solely upon the extent of social harm that is caused, because the actual identification of both social harm and the point at which it is sufficiently grave to justify suppression, rests upon a value judgment as to what is

necessary to protect the community's interests.

Secondly, the examples of his treatment of infants, intemperance, and the prevention of future jeopardy to society, indicate that morality is far from absent from his considerations. These examples will be discussed seriatim.

It is clear that the libertarian doctrine is expressly limited to "human beings in the maturity of their faculties"[41] for the young and weak must be protected against their own actions as well as from external injury. Further, in Mill's estimations, to bring a child into existence without being able to provide it with instruction and training, is a moral crime.[42] This can only be based on the moral principle that the young and weak are in need of special security.

It is apparent that Mill regarded certain areas of conduct as being so pernicious as to require regulation and control, such as the promotion of intemperance for financial gain, and it is difficult to see how he arrives at this conclusion other than from a moral standpoint. It is insufficient to say that it is because direct harm is occasioned to an assignable class of individuals, for his judgment is also undoubtedly prompted by a forceful moral precept, for example[43]

> The interest, however of these dealers in promoting intemperance, is a real evil and justifies the State in imposing restrictions and requiring guarantees which but for that justification would be infringements of legitimate liberty.

In this example Mill might well claim to be addressing

himself not to the liberty of the individual to drink and inflict possible injury upon himself if he wishes, but only to the vice of the commercial promotion of intemperance. Nevertheless, this should not obscure the fact that as an initial hypothesis, the encouragement of intemperance was itself classified as being morally wrong. This is almost self evident, for there is no other basis upon which to distinguish the unacceptable practice of trading in liquor from the acceptable practice of selling vegetables.

Again, Mill concedes the right of society to take antecedent precautions to prevent possible future harm, even if purely self regarding conduct is affected:[44]

> Drunkenness, for example, in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that a person who had once been convicted of any act of violence to others under the influence of drink should be placed under a special legal restriction personal to himself: that if he were afterwards found drunk ... and that if when in that state he committed another offence, the punishment ... for that other offence should be increased in severity.

Here clearly a restriction is being placed upon an individual's conduct before an injury has been caused to others. The restriction, it is submitted, derives from two premises: (a) that a direct harm may possibly be caused to society, and (b) because of this it is morally justifiable to override the interests of the agent in a self regarding act (by imposing a warning peculiar to himself) for the well-being of the community. One might

argue that the sanction would not apply until society is occasioned a perceptible harm and thus no moral principle is involved. But this would be misleading for it should not be overlooked that Mill is dealing with a threat, perhaps of a severe kind, emanating from an organ of the State, pertaining to purely private conduct; enforcement is envisaged through the threat of coercion. This conclusion (and indeed the previous ones relating to the exclusion of infants, and the vice of promoting intemperance) it seems was undeniably reached after balancing conflicting interests and arriving at a moral judgment.

A fourth example of the role of morality in Mill's theory, as will be explained in more detail shortly[45] is that a limited degree of paternalism is inherent to Mill's thesis; if morality is entirely excluded from his model then such a conclusion will not be tenable. However, this need not be further considered at this stage because, as has been illustrated in the foregoing pages, morality remains a vital coefficient in his thesis both at the general and specific (for example in the gradation of offences) levels.

Qualifications to Mill's doctrine

The basic tenets of Mill's theory of liberty have been adumbrated, and now the qualifications to his doctrine may be stated. The two have been segregated for the purposes of logical presentation; the qualifications are dealt with separately here because in the light of his statements of

the libertarian principle it will be seen that some of his reservations are susceptible to quite salient criticism and tend to militate against the internal consistency of his thesis. These limitations will now be stated together with some critical responses.

Firstly, Mill deplores the innate tendency of mankind towards uniformity and imitation, and considers that society is enriched by individuality. Yet he asserts that it is only for a human being who has arrived at the "maturity of his faculties" (both physical and mental infirmity are envisaged here) to determine his own pattern of existence. It is legitimate to explain, during the process of maturity and learning, the "ascertained results of human experience" in other words what experience has taught others, but it is for the individual to interpret his own experience in his own way. At this stage at least, it is possible to say that Mill envisages a policy of paternalism until an individual reaches the stage of being capable of forming his own judgments. Beyond this, true personal development can only result from empirical experimentation. Only in an atmosphere of freedom can such virtues as originality flourish, thereby enhancing the stature of society. This is Mill's ideal; its alternative was somewhat derisively described thus: "He who lets the world ... choose his plan of life for him has no need of any other faculty than the apelike one of imitation". An indication of his vehemence is afforded in some measure by his later utterance that

"whatever crushes individuality is despotism". However, his important caveat as to when a limited paternalism is justified represents a significant restriction of his theory, and in practice it would have to be marked off with far greater particularity from the situations where interference is not warranted.

Secondly, a qualified admission is made as to the existence and desirability of a concept of social obligation. He guardedly comments that everyone who receives the protection of society owes a return for the benefit, and also "the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest". This entails respectively an acceptance of those burdens necessary for defending the society from injury and molestation, and a refraining from injuring the interests of one another. The second category is undoubtedly the more significant and it covers the "other regarding" acts which were mentioned earlier;[46] it is here proposed to show how its strict separation from the self regarding sphere becomes at places quite tenuous, thereby having the effect of expanding the rights to interfere with the individual.

It is important to bear in mind that Mill's plea for liberty is essentially a qualified one, and this is stated quite emphatically;[47]

> Whenever, in short, there is a definite damage or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law.

Therefore, a libertarian State under Mill's doctrine would only be expected to tolerate "merely contingent" or "constructive injury", where there is no breach of duty or perceptible hurt occasioned to any particular individual except the agent himself. This is the burden, he feels, that society should be prepared to bear in the name of human freedom.

Thus far the framework of his argument is laid down with reasonable clarity: to a hypothetical subject under Mill's libertarian regime it would be possible to say: "You have freedom of thought and conscience to formulate your own conception of what you regard as the best way of life, and your search for individuality will also prove beneficial to society. This freedom would be meaningless if you were unable to translate your thoughts into actions. Therefore you may do so. You may act as you wish irrespective of the unfavourable opinions of others, but your freedom ends at the point where it causes direct injury to those to whom you owe an assignable obligation (which includes, potentially, the rest of society)."

However, it is further stated that it is untrue that human beings have no concern in the well-being of their fellows. He advocates the need for "disinterested exertion" to promote the good of others, for we owe to each other help to distinguish the good from the bad and should encourage the cultivation of the former, therefore others should be stimulated to exercise their higher faculties

towards wise objects instead of foolish, elevating instead of degrading. He warns that in the last analysis the individual must be the final judge.

This qualification seems incongruous and impairs the efficacy of his hitherto definitive concepts, for previously, in suggesting that those holding the prevailing beliefs should be amenable to criticism and tolerant to dissentients, he expresses the opinion that the validity of received principles may in retrospect prove to be false whereas the minority beliefs may embody the veracity of their age. It is submitted therefore that to exhort others to that which is good, to "obtrude" thus upon them, assumes that the prevailing public sense embraces purely the truth. This is to directly deny the possibility of the converse, namely, that the received opinion may be false. This inconsistency is compounded by his own admission that public debate is heavily weighted in favour of the majority who may, and in fact often do, resort to unfair advantages. So in this situation, the dissentient for whom strong distaste is felt will be subject to more than mere "inconvenience", for social ostracism or active interference cannot be rationalised in such limited terms.

In short, a distinction must be drawn between a fair and equal argument with a candid exchange of views (which he strongly advocates and which is compatible with his thesis) and, on the other hand, taking the matter a degree further and removing it from the area of pure discussion

into one where collective pressure is exerted in an attempt to align the conduct and thought of minority elements with the common standards (which is the thin end of the wedge leading to "tyranny of the majority").

In formulating such a qualification he also strikes at his cardinal precept of "individuality", as being one of the elements of well-being. This, it is submitted, is certainly not conduced in a situation where there is scope for the majority to actively encourage others to channel their behaviour into the narrow conception of what is regarded as socially desirable, and to subject them to the "inconveniences which are strictly inseparable from the unfavourable judgment of others" if they fail to do so.

In the light of this we may perhaps return to the original statement given to the hypothetical subject under Mill's regime. To the advice "You may act as you wish ... but your freedom ends at the point where it causes direct injury to those to whom you owe an assignable obligation". We must now add: "However, if your search for individuality takes you along unconventional paths (which nevertheless causes direct harm to no-one) beware lest your acts be regarded as "bad" for then your fellows will seek to lead you back towards the popularly held norms of convention and social practice. If you ignore their strictures you will not be legally punished, but you will be subject to social "inconveniences" which may prove utterly oppressive and may be quite sufficient to coerce you into submission."

One may accordingly suggest a balance which focuses upon degree. It is submitted that whereas free, active discussion is not inconsistent with Mill's thesis, any extension of his doctrine to accepting vigorous exhortation as a means of aligning an alleged falsehood to a supposedly popular truth, is to vest the latter with an absolute qualitative value and to facilitate the encroachment of the influential upon the weak, which is the very abnegation of Mill's creed. This is not only contradictory but it also destroys the kernel of his theory that freedom of thought and expression, particularly for minorities, is of inestimable social value.

It has been seen that the distinction between the self regarding and other regarding categories is in places highly equivocal and that when this arises, the individual's position becomes subject to further scrutiny and often, attack. A specific aspect to this general problem is drawn by R.A. Samek[48] who observes that on reading Mill's essay it may be difficult to differentiate between the inconveniences stemming from the unfavourable judgment of others and moral disapprobation. However, the distinction, he submits, may be drawn not only from the degrees of permissible penalty, but also from each rationale. In the one case the penalty, which is not intended as punishment qua punishment but merely as a consequence of the faults themselves, is inseparable from a person's liberty to voice his likes and dislikes

although they harm nobody. In the other case a wrong has been committed and the offender is punished because of what he has done. The author seems to be referring to one situation where conduct breaches an assignable social obligation and another situation where it does not. The confusion arises when one recalls Mill's observation that when conduct is directly injurious to society (and is not to be tolerated in the name of some countervailing virtue) the agent may be subject to legal and moral punishment. Yet, the moral disapprobation of society would also apply in the sense envisaged by Mill when he stated:[49]

> The acts of an individual may be hurtful to others or wanting in due consideration for their welfare without going the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by the law.

The difference between these two situations indeed seems a fine one, and perhaps a further comment may be added here. The distinction rests upon the concept of a "wrong" which is absent in the first case and present in the second. This notion becomes severely blurred in situations where it is uncertain whether offensive conduct will or will not be held up as a "wrong" - the act complained of may thus have an equivocal status, whilst the penalty will, unless the law is used to reinforce a moral rule, be identical in both cases.

Curiously, at times Mill seems to set out a case for certain values as being crucial to his thesis and then to

severely undermine them. He does this with various aspects of liberty which he feels may legitimately be curbed in different ways[50] to the point of being virtually extinguished. His attitude towards individuality and the value of "experiments with living" furnishes a typical example of his conceptual ambivalence. Mill concedes that there are few persons whose experiments, if adopted by others, would result in any improvement upon established practice. He adds "but these people are the salt of the earth" for without them attitudes would become atrophied. Variety is a thing of value per se. These small number of individuals exhibiting originality help to make society alive to its limitations, to discourage complacency, to force it to realise that there are still goals to strive for, and achievements to be accomplished.

Thus, originality is seen as the spearhead against collective mediocrity, which tends to be the "ascendant power among mankind". The initiation of all wise and noble things comes from individuals, generally proceeding at first from one individual, and the "honour and glory" of the average man is that he is capable of following such initiative. To paraphrase this viewpoint: profound social changes are wrought through a kind of snowballing process where an isolated opinion gradually gains momentum, gathering adherents on its way from the largely unthinking unoriginal mass of collective mediocrity which compose the bulk of society. Therefore, whilst Mill states his case

for originality, diversity and individuality clearly enough, with equal clarity he discloses his reliance upon the ability of society to respond to the overtures of the few. This will vary; in receptive ages there is no distinct advantage in acting differently unless it is also an improvement upon established practice, whereas in a period of extreme intellectual conservatism, the mere examples of non conformity or eccentricity are useful in helping to break the restraints of the "tyranny" of opinion. Yet the picture he paints is a gloomy one; the colour of individuality does not stand out from the canvas, but is merged into obscurity, almost indistinguishable from the sombre profile of social uniformity.[51]

> But the evil is that individual spontaneity is hardly recognised by the common modes of thinking as having any intrinsic worth or deserving any regard on its own account. The majority being satisfied with the ways of mankind as they now are ... cannot comprehend why those ways should not be good enough for everybody ....

Later he adds:[52]

> It does not occur to them to have any inclination except for what is customary. Thus, the mind itself it bowed to the yoke: even in what people do for pleasure, conformity is the first thing thought of ... peculiarity of taste, eccentricity of conduct, are shunned equally with crimes ....

The original thinker, it seems, has been presented with an uphill struggle. It might be argued that Mill is particularly lamenting the dull conformity of his own contemporary society and that he attests to the existence

of eras more favourable to progressive thought. But this does not seem to dispose of the problem, for surely the difficulties are enumerated more convincingly than the successes? Yet diversity and individuality are ascribed in an almost perfunctory way as the source of improvement of mankind in Europe, in contrast to the stagnation which has become socially uniform in China, thereby stultifying its avenues of progress. Is he not placing undue emphasis upon individuality and liberty as being at the forefront of national and social development, having regard to his self confessed limitations upon its practical effect? An attempt to reconcile this necessarily entails a compromise at one level or the other. If individuality, diversity and social experimentation afford such a dynamic process as to create marked cultural and social differences between nations then the effect of these qualities should not be so severely undermined in other passages of his writings.

Thus far we have criticised Mill's essay from the standpoint of its conflicting and inconsistent principles. Let us now turn to some of the narrower criticisms raised by various learned commentators.

Lord Devlin draws attention to Mill's suggestion that to prohibit an opinion contrary to one's own involves an assumption of infallibility. He remarks that[53]

> To admit that we are not infallible is not to admit that we are always wrong. What we believe to be evil may indeed be evil and we cannot for ever condemn ourselves to inactivity against evil because of the

> chance that we may by mistake destroy good. For better or worse the law-maker must act according to his lights and he cannot therefore accept Mill's doctrine as practicable ....

In other words, the duty of the law-maker is to govern effectively; this is seen as his necessary role and he should not waver in a state of constant moral doubt. Here perhaps their difference in approach is most clearly illuminated. For, as B. Mitchell comments,[54] one should not interpret Mill as saying that if infallibility were possible, suppression would be justified, for Mill observes[55]

> We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

Thus, Devlin would act pragmatically, for he is concerned with the mechanics of a well ordered - or at least an effectively run - society. On the other hand, Mill is apt to raise theoretical objections in his search for possible abuses: the practical implications of such hesitation is not for him a paramount concern.

In fairness, it should be noted that Mill anticipates this kind of objection, but he does not seem prepared to pronounce conclusively upon it:[56]

> Judgment is given to men that they may use it. Because it may be used erroneously, are men to be told that they ought not to use it at all? To prohibit what they think to be pernicious is not claiming exemption from error, but fulfilling the duty incumbent on them, although fallible, of acting on their conscientious conviction. If we were never to act on our

> opinions because those opinions may be wrong, we should leave all our interests uncared for and all our duties unperformed ... Men, and governments, must act to the best of their ability. There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life.

Mill would override the right of society to forbid the propagation of that which is regarded as false and pernicious, on the basis that we are only entitled to regard our views as valid through the complete liberty of others to contradict.

Devlin also takes Mill to task for his treatment of freedom of action. Mill evidently visualises an idealistic picture where a number of men are doing things of which others may disapprove, but which are done after serious thought and discussion in an attempt to create the most suitable way of life for themselves as individuals. The reason for this is that[57]

> Mill believed that diversity in morals and the removal of restraint on what was traditionally held to be immorality would liberate men to prove what they thought to be good ... But he did not really grapple with the fact that along the paths that depart from traditional morals, pimps leading the weak astray far outnumber spiritual explorers at the head of the strong.

This is a fair criticism, but it exposes Devlin to the rebuke that he seems to be denying freedom any but an instrumental value. Thus, Devlin states:[58]

> Freedom is not good in itself. We believe it to be good because out of freedom there comes more good than bad ... but no good can come from a man doing what he acknowledges to be evil. The freedom that is worth having

> is freedom to do what you think to be good notwithstanding that others think it to be bad. Freedom to do what you know to be bad is worthless.

One may envisage Mill's response as being that the individual must still nevertheless decide; we can only entreat him to do that which is good. As one commentator has pointed out,[59]

> A man cannot be free to do what he believes to be right without being free to do what he knows to be wrong.

It must be remembered that although Mill's aim was to enhance the stature of society, for which liberty was a condition precedent, he would undoubtedly endorse the right of others to do that which they regarded as bad or wrongful. He considers that this must be tolerated because on balance the justification will be that more good than bad will emerge from a society where the questioning of established practices, experimentation and intelligent dialogues between majority and minority elements, are able to proliferate in an atmosphere of freedom and tolerance. This is possibly too idealistic, and Devlin is probably correct in that those seeking exploitation for selfish motives will, in some areas at least, predominate over the "spiritual explorers". But a major fault of his criticism is that it assumes that one may interfere with dissentients to question their motives and permit one type of conduct (that which is motivated by the agent's pursuit of good) and proscribe the other (if the agent regards it as being wrong).

Whilst this may be compatible with Devlin's thesis (although for him, violation of basic moral standards would be prohibited irrespective of the individual's motive) it is certainly not with Mill's, where such a degree of interference would not be countenanced. This criticism of Devlin's would not alone justify upsetting Mill's principal dictum that freedom of thought should be exercised without such a vigorous degree of examination from others.

One aspect of this discussion deserves more detailed treatment, namely, the commercialisation of vice to which Devlin raised an objection, showing that here, it seems, Mill's teaching wavered. Mill deals with the problem of[60]

> ... classes of persons with an interest opposed to what is considered as the public weal and whose mode of living is grounded on the counteraction of it. Ought this to be interfered with or not? Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp or to keep a gambling-house?

Against tolerating them he argues that[61]

> ... although the public, or State are not warranted in authoritatively deciding, for the purposes of repression or punishment, that such or such conduct affecting only the interests of the individual is good or bad, they are fully justified in assuming, if they regard it as bad, that its being so or not is at least a disputable question; that this being supposed, they cannot be acting wrongly in endeavoring to exclude the influence of solicitations which are not disinterested, of instigators who cannot possibly be impartial - who have a direct personal interest on one side ... which the State believes to be wrong, and who confessedly promote it for personal objects only.

Surely, he asks, there is nothing lost or sacrifice of

good by allowing people to act either wisely or foolishly, free from the attentions of persons who seek to influence them for purposes of their own. Gambling houses and wholesale prostitution created by vested interests should, he feels, be prevented. So although people should be free to choose whether to indulge in these vices, their decision should be made without the promptings of self-seeking interests. But it seems extremely difficult to draw such a distinction. If we are to connect theory to reality, the practice of prostitution by individuals is permissible, and in the same way, there should be an availability of facilities to gamble. However, the State is required to step in, to prohibit either prostitution or gambling taking on the form of an organised enterprise. Mill elects not to decide whether it is valid to justify the moral anomaly of punishing the accessory when the principal is (and must be) allowed to go free.

In practical terms, this division is completely untenable. It is submitted that in this area a bold, decisive policy statement was clearly needed to definitively determine the status of such acts, instead Mill has merely compounded existing difficulties by drawing unworkable shades of differentiation.

Further, Devlin sees this as an essentially simplistic categorisation of men who have a vested interest in trading in vice. Disinterestedness (of those who trade in vice) is not proved merely because money is, or is not demanded, and

he offers his own distinction between those who practise what they know to be vice and those who practise what they believe to be virtue. Only the latter, he says, are truly disinterested.[62]

In fact, Mill did not merely suggest that the pursuit of pecuniary advantage was the index of whether a solicitation is disinterested or not; he provided the wider basis of a "direct personal interest" which is possibly better than Devlin's alternative. Devlin considers that a person is disinterested if he believes that he is practising a virtue, but surely this does not preclude him from having a vested interest in it? For a pimp who believes that prostitution provides a useful service to the community is, subjectively, practising a virtue, although he could not claim to be disinterested in its financial outcome.

More fundamentally though, it is submitted that the rigours of Mill's ostensibly laissez faire doctrine are considerably diminished by his treatment of the question whether the State, while it permits conduct, should nevertheless indirectly discourage that which it deems contrary to the best interests of the agent, for example, by restricting the sale of intoxicants. This may be achieved, inter alia, by imposing taxation for the purpose of making these commodities difficult to obtain by those of average financial means. This, it seems, differs only in degree from their entire prohibition and would be justifiable only if that were justifiable. He does not directly deal with

this, but seems to indicate that a form of indirect paternalism is permissible even if it is for many. prohibitory in form. This may be implied from his admission that taxation is a necessary revenue measure and that it may be applied even if for some persons it creates a total restraint. Also it is said that the State may more readily impose taxes on commodities which could, if taken in excess, prove positively injurious.

In commentating on this inconsistency, Samek claims that Mill cannot have it both ways, for in classifying acts as "self regarding" he is thereby estopped from saying that legal or moral sanctions should be applied to them. Hence, if Mill's thesis were followed to its obvious conclusion, a number of acts which are generally regarded as immoral would escape any sanction at all, whether direct or indirect.[63]

In this discussion of the major lines of criticism of Mill's work, a general observation may be made that a pervasive feature of his writing is that the notions of Right and Wrong, True and False opinions and the like, are viewed as definitive, immutable concepts, without qualification or explanation as to precisely what they denote. Because of this, his doctrine proceeds from an extremely arbitrary personal judgment, for frequently his writings are characterised by assertions which can only be tenable if some precept is upheld as an absolute, imparting its own inherent validity, for example, that an opinion should not

be suppressed because it may prove to be true. Perhaps the logical reply to this is that Mill's tract is, and was only intended to be, completely doctrinaire. Arguably, he only purports to formulate a broad philosophical exposition - a philosophy to be cherished for its impassioned idealism, an aspiration which was never feasibly intended to relate to rational political dogma.

Now that the broad scope of Mill's doctrine has been discussed together with some of its more fundamental criticisms, it is pertinent to turn to Professor Hart's contribution to the libertarian doctrine and to see what modifications he has found it necessary to make.

H.L.A. Hart

In "Law, Liberty and Morality"[64] Professor Hart makes a spirited defence of Mill from his principal critics, Sir James Fitzjames Stephen and Lord Devlin, and in so doing articulates his own statements of the proposed scope and function of the criminal law, which now falls to be discussed.

It would not be amiss to cite here Hart's caveat that it is not intended[65]

> ... to defend all that Mill said; for I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to me to be right.

Hart considers that the issue should be approached in

terms of justification, for he observes, where there is no prima facie objection, wrong or evil, men do not ask for, or give justifications of social practices. Hart's standpoint, although broadly sympathetic to Mill's principle, is clearly couched in a more cautious vein;[66]

> ... we are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something prima facie objectionable to be tolerated only for the sake of some countervailing good.

Hart, in contrast to Mill, is more willing to apply his principles to the society to which they relate and in so doing brings Mill's doctrine up to date in noting new changes in emphasis and attitudes. His own modifications reflect the implications of this method of analysis; for example, the wane of laissez faire since Mill's day is described as "one of the commonplaces of social history" with the consequence that paternalism has proliferated to fill the vacuum. Accordingly, whereas Mill abhorred the concept of paternalism as an unwarranted encroachment upon the liberty of the individual, Hart admits that this does not reflect the actual mechanics of modern society. He concedes that there is now a general decline in the belief that individuals know their own interests best, and an increased awareness of the many factors "which diminish the significance to be attached to an apparently free choice or to consent". The stringent restrictions upon the lawful sale of drugs are cited as one of the many instances of what Mill would term

"paternalistic legislation" which now abound in the modern statute book. Despite these concessions, it must still be observed, that for Hart there is a line beyond which the law may not trespass, and that the enforcement of morals is on the wrong side of that line.[67]

The attempt to sever paternalism from the enforcement of morality is an important aspect of his thesis and it has a particular bearing upon this debate. If Hart is unable to separate these two concepts, then the libertarian argument is severely impaired, because if popular morality is to be given full expression under the guise of paternalism, the plea for individual freedom becomes somewhat meaningless.

Hart's concept of Paternalism

Hart tackles the rules excluding a victim's consent as a defence to murder or assault, which are explained as not entailing the enforcement of a moral principle but as being a piece of paternalism, designed to protect the individuals against themselves. Similarly, the prohibition of the sale of dangerous drugs is not designed to punish the seller for his immorality, but to prevent harm to the would-be purchaser.

Clearly a modification of Mill's principles are required to accommodate the realities of present day criminal law, but Hart does not consider that such modifications mean that the law is enforcing positive morality. Instead he seeks to justify them by raising the distinction between paternalism and legal moralism, which others have been in

error in neglecting. It is incorrect to infer that if the law goes further than protecting one man from another, it must therefore be designed to punish moral wickedness. Thus statutes punishing cruelty to animals are justified as being concerned with the suffering involved, rather than the immorality of torturing them.[68]

Hart's concession of recognising a limited paternalism as a necessary modification of Mill's principle of liberty, draws sharp criticism from Devlin, who attempts to discern what Hart understood by paternalism in this context. Two possible divisions can be made: it may either be complete paternalism, or alternatively he asks[69]

> ... is a distinction being drawn between a man's physical good and his moral good? Is Professor Hart, so to speak, a physical paternalist and a moral individualist?

Hart, he says, fails to illuminate a distinction between paternalism and legal moralism (which Devlin terms moral paternalism) which Devlin feels would have made his whole argument "readily comprehensible". However, his own inquiries lead to the conclusion that it is not possible to draw such a line and hence he considers that a serious inconsistency in Hart's thesis has been exposed, for as Mitchell comments,[70] if paternalism includes "moral paternalism" the enforcement of morality is in effect conceded. Complete paternalism would negate the whole doctrine which Hart has adopted for[71]

> ... if there is one thing that is clear, it is that Professor Hart wholeheartedly supports

> the Wolfenden Committee's recommendation that the law against homosexuality should be repealed on the ground that it is not the law's business.

This leaves the only alternative of physical paternalism. Manifestly, it must stand in isolation from the moral aspect, and Devlin is unable to rationalise such a demarcation[72]

> Neither in principle nor in practice can a line be drawn between legislation controlling the individual's physical welfare and legislation controlling his moral welfare ... if ... we are grown up enough to look after own morals, why not after our own bodies?

So with reference to the exclusion of consent as a defence to murder or assault, Devlin suggests that we cannot treat such crimes as dealing with offences against the body of the consenting party and not against morals. He adds that, to take the case of masochism,[73]

> To say that the law should intervene there not because of the vice but to protect the man in his own best interests from getting bodily hurt hardly seems sense.

It should be pointed out that this separation between physical paternalism and the enforcement of morality is Devlin's own deduction. It is submitted that his rationalisation is a valid one, for Hart himself observes that despite his concession of paternalism "the modified principles would not abandon the objection to the use of the criminal law merely to enforce positive morality".[74] Thus Devlin has only boldly stated and examined the ramifications of a principle which Hart only hints at obliquely.

It has been suggested[75] that one might accept that

physical paternalism includes moral paternalism, but deny that moral paternalism entails the enforcement of morality. This can be achieved if one views the enforcement of morality as preventing certain behaviour on the basis that it is thought to be morally wrong, whilst moral paternalism may be taken to mean preventing people's corruption or degradation. In practice they would often overlap, but the grounds of prohibition would be conceptually distinct.

In contrast, Devlin claims that it is impossible to draw any significant distinction between moral paternalism and the enforcement of the moral law. A moral law, he asserts, is necessary for paternalism in order to achieve a common judgment as to what constitutes a man's moral good. He comments that[76]

> If then society compels a man to act for his own moral good, society is enforcing the moral law; and it is a distinction without a difference to say that society is acting for a man's own good and not for the enforcement of the law.

Therefore, having found no satisfactory explanation of Hart's paternalism vis a vis his acceptance of Mill's libertarian doctrine, Devlin is left to conclude that "Paternalism, unless it is limited in some way as yet unstated, must ... make all morality the law's business".[77]

It is submitted that due to the imprecise terms of Hart's paternalism and its attendant ambiguities, it has not been effectively separated from the enforcement of morality. Therefore, Hart's principal critic has been

able to successfully introduce a strong doubt as to the consistency of his thesis. Perhaps the crucial factor is that for Hart's theory to remain tenable, a demarcation has to be drawn between physical and moral paternalism, and particularly in view of Devlin's persuasive attack on this line, it becomes extremely difficult to envisage physical paternalism isolated from its moral standpoint. Further, it is submitted that Hart's rationalisation of statutes forbidding cruelty to animals as being concerned with their suffering and not the immorality of the act, is defective. The statutory prohibition is surely predicated upon the moral principle that such suffering is wrong, and not merely wrong, but wrong to a sufficient degree as to warrant statutory intervention. So the immorality of the act becomes the determinant of both judgments in this case.

Therefore, the inclusion of paternalism within a libertarian model as framed by Hart has eroded the core of the fundamental principle, that society acting through the agency of the law and government may not interfere with the individual's discretion and enforce popular moral beliefs. Such a conceptual ambivalence severely exacerbates the already difficult task of resolving the law's position upon drug taking and related issues, which on Mill's principles would belong to the self regarding category whilst on Hart's it may either be prohibited pursuant to his doctrine of paternalism, or permitted on the basis that to

decree otherwise would be tantamount to enforcing a moral principle. This discrepancy, it is submitted, casts grave doubts upon the validity of Hart's thesis and leaves Devlin's argument, perhaps not unimpeachable, but certainly more coherent and definitive in purpose and direction.

Hart has provided a further instructive contribution to this general area of debate by his analysis of the implications of the legal enforcement of any kind of conduct. Here his opposition to the enforcement of morality and endorsement of Mill emerges strongly. But more importantly, this section serves to elucidate that there are contrasting aspects to coercion, each having different repercussions and requiring different justifications.

Hart's analysis of legal punishment

The principal divisions drawn are (a) coercion by threat of legal punishment,[78] and (b) the actual punishment of those who have broken the law.[79] In addition, other forms of enforcement also operate, such as legal measures which render disobedience impossible or difficult thus serving to frustrate rather than punish the act.

(a) "Enforcement as Coercion"

Hart asserts that there is a great difference between inducing persons by means of fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one. One can readily appreciate the value attached to the first category, whilst in relation

to the latter[80]

> ... it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves.

And in a passage which is reminiscent of Mill, he adds[81]

> The attribution of value to mere conforming behaviour, in abstraction from both motive and consequences, belongs not to morality but to taboo.

(b) "Enforcement as Punishment"

Under this heading which deals not in the threat, but in the actual infliction of punishment on offenders, he draws attention to a salient criticism of any theory which does not attempt to justify punishment by its results but simply as something called for by the wickedness of a crime. It is most credible and intelligible, he considers, where the crime has harmed others and there is both a wrongdoer and a victim. But where there is only a mere transgression of a moral rule, retribution rests simply upon the claim that "in morality two blacks make a white", in other words that the "evil of suffering added to the evil of immorality as its punishment makes a moral good".[82] What he seems to be arguing here is that the consequences of an unlawful act provide an important moral yardstick by which to gauge the gravity of the offence - without it the task of punishment can only be approached in terms of the intrinsic quality of the wrongful act, bereft of its context, which includes such important aspects as its consequences.

Hart places a restriction upon the rightful ambit of legal punishment insofar as it serves as an expression of popular feelings of moral outrage. The theory of utilising the criminal process to satisfy the community's sense of hatred and disgust for the criminal and their "healthy" desire for revenge, as propounded by both Stephen and Devlin, meets resolute opposition from Hart. Moral condemnation is normally expressed in words; why therefore, he asks, should denunciation in these cases take the form of punishment?

The most plausible form of the extreme thesis is said to be that the legal enforcement of morality is valuable because it preserves an existing social morality. He questions the nexus between legal prohibition and the prevailing public mores, and, particularly with regard to sexual mores, concludes that there is little supporting evidence that the criminal sanction operates to effectively sustain the conviction that conduct is morally wrong. Most people would feel aversion towards incest or homosexuality irrespective of its legal status, and it would therefore be surprising if legal prohibition proved a significant factor in preserving the general opinion that such practice is immoral. The belief in the minds of the overwhelming social majority that such conduct is morally wrong is attributable to their instinctive sense of repulsion and disgust stemming from a deep feeling that these offences are unnatural. This attitude is unlikely to change if the State ceases to

endorse moral aversion with legal punishment.[83] In short, the continuation of an existing social morality is not contingent upon the prohibition of offences by the criminal law; its preservation rests upon the psychology and popular responses of the community to the particular conduct itself. Against this view, it may be argued that the declaring of an act to be criminal connotes to the average man a corresponding association with wickedness and immorality, and on this premise it is the law which fulfils one of the dominant roles in shaping social attitudes towards human conduct. One writer suggests[84] that the legality or otherwise of conduct in question should enter any discussion of the morality of a particular course of action, for[85]

> ... the law exercises a certain influence in moral matters due to the generally accepted moral obligation to obey the law which accordingly makes the legal position a relevant factor in assessing the morality of an action.

Further, it is undoubtedly no exaggeration to say that the law itself serves to inculcate many moral premises and ideals; this has led to the remark[86] that most people's "basic value orientation is determined by the values expressed in a given legal system".

It would perhaps be misleading to characterise law and morality as being totally polarised, for in fact, in the case of many offences (to which murder, physical assault and theft are signal exceptions) which are not regarded as intrinsically immoral or do not evoke emotive reactions,

the law's position serves to give direction to public attitudes. Nevertheless, it remains equally true to say that where law and contemporary standards are not in alignment, the latter will often have a significant effect upon the direction and reform of judicial thought.

In conclusion, Hart has provided a useful and perceptive analysis of the libertarian doctrine; his method of approach differs from Mill who exalts the virtues of freedom for which the libertarian principle is propounded, whilst Hart seeks to illuminate the vices of unwarranted coercion against which liberty must necessarily be defended. Hart's inclusion of paternalism, which perhaps he was compelled to accept as being part of the "contemporary social reality", has led him into murky waters. His rescuers would, it is submitted, require clearer definition of this aspect of his theory before he could safely be pulled back on to <u>terra firma</u>.

CHAPTER THREE

THE ENFORCEMENT OF MORALS

In this chapter, the concept of the enforcement of morality will be examined through the commentaries of two of its principal proponents, Sir James Fitzjames Stephen and Lord Devlin. The writings of Lord Devlin particularly have come under attack from Professor Hart and this has blossomed into what has been popularly termed the Hart-Devlin debate, which will be reviewed in the latter part of this chapter.

James Fitzjames Stephen

In "Liberty, Equality, Fraternity"[87] Stephen takes issue with Mill's doctrine, and in turn he renders his own powerful arguments in favour of coercion as a desirable and necessary element for the well-being of society. His objections to "On Liberty" are discussed here rather than in the previous chapter because Stephen's own formulation of principle emerges from his disagreement with the libertarian ethic.

The three main aspects of Stephen's thesis deserve detailed consideration: liberty in general, liberty of thought and discussion, and liberty in its application to morals. The first two provide the conceptual background for the last-mentioned, with which we are primarily concerned.

(a) Liberty in General

The notions of liberty, equality and fraternity, in Stephen's estimation, have been considerably exaggerated in

importance, for society's existence is based not upon liberty but compulsion, and in reality it is the latter only which serves to shape and condition morality, religion and politics. This assessment illustrates a vitally different point of departure from Mill, who places faith in freedom to provide mankind with the opportunity to profit by the good example of others, even though the process may prove to be an uphill struggle at times. Stephen, on the contrary considers that if human beings are left entirely to their own devices, they will probably degenerate into a morass of wanton depravity. For him therefore, the restraints upon immorality operate as a bulwark against the decline of civilised existence.

The concept of liberty does not for Stephen connote anything significant, it is not in itself a definite thing, and nothing can be predicated upon it unless it is known "who is permitted by whom to do what". Thus the question whether liberty is good or bad is in itself irrational, for its answer depends upon time, place and circumstance. It is undoubtedly true that this and other related concepts are purely relative, but nevertheless, Mill's doctrine does at least partly give implicit recognition to this in that it allows changing attitudes and needs to be reflected through discussion, example and individual experimentation.

Stephen is of the opinion that it is coercion that holds pride of place as an agency of social change and reform, for he claims that all the great political changes

in Europe since the 16th century have been brought about by the force of an often numerically small minority. He concludes that the use of force was obviously justifiable in some of these cases, for even the most ardent disciples of Mill "would be the last persons in the world to say that the political and social changes which have taken place in the world since the sixteenth century have not on the whole been eminently beneficial to mankind".[88] The most important uses of coercion (other than for self protection) are cited as:[89] 1. for establishing and maintaining religion, 2. for establishing and maintaining morality, and 3. for altering existing forms of government or social institutions. Manifestly he sees it as a dynamic tool in forging the mould in which society is set. In a later passage he defines liberty in its relation to coercion. It is postulated that power precedes liberty, liberty being dependent upon it, for only under a well organised, strong government can any liberty exist at all. Implicit in this is the notion that mankind tends towards oppression and inequality, against which an effective administration acts as a defence. This approach may be further surmised, for example, from his expressed opinion that democracy does not in itself have any definite or assignable relation to liberty.

Mill's distinction between acts which regard only the agent and those which concern other people is attacked as being too definitive, for[90]

> In fact, by far the most important part of our conduct regards both ourselves and others, and

> revolutions are the clearest proof of this. Thus, Mr. Mill's principle cannot be applied to the very cases in which it is most needed.

However, Mill in fact does admit that the two may interrelate, but the point that seems to have eluded Stephen here is that for practical purposes conduct must be placed into one category or another. Thus, if a person, acting for his own ends, begins to affect others adversely, then the self regarding character of his conduct is lost and it is labelled as being mischievous to society, bringing its concomitant rights to self protection into play. In short, the status of any given behaviour must be resolved one way or the other.

Further, Stephen's example of revolutions does not seem particularly cogent, for it would be unlikely to pose any undue problems for Mill who would surely reply that the rights and wrongs of a revolution would, for practical purposes, be determinable by what the bulk of society either considers to be right or what the bulk can be so induced to regard as right by a vociferous minority. In the event of a minority carrying out a coup and imposing its will on the majority without its acquiescence, then on principle Mill would undoubtedly condemn such an assumption of authority, for he firmly suggests that the interests of the rulers should reflect the interests of the governed.[91]

Stephen tackles some of Mill's exceptions and qualifications to his doctrine of liberty. Firstly, Mill's principle is meant "to apply to human beings only in the maturity of

their faculties" and similarly, despotism is legitimate in backward societies to deal with barbarians, if the end is their improvement. Thus liberty has no application "anterior to the time when mankind have become capable of being improved by free and equal discussion".

This qualification, he feels, reduces the doctrine to an "empty commonplace" because, Stephen asserts that it is undeniable that there is a sphere within which the tastes of people of mature age ought not to be interfered with, and secondly, that no one suggests that it is good to be compelled to do what one does not like unless the person exercising the compulsion is not only stronger but wiser. This means that either superior wisdom is not in every case the reason for controlling others, or that in all "civilised" countries the mass of adults are so well acquainted with their own interests that no compulsion or restraint for promoting their interests will prove to their betterment.

Mill added that once man has reached the capacity to improve by conviction or by persuasion resulting from free and equal discussion, compulsion ceases to be permissible. There are, Stephen says, two possible interpretations to this: in its widest form, the wildest savages and most immature youths capable of any sort of education are capable of being improved by free discussion, so compulsion is not justified here. So, for example, if boys in a school can be convinced of the importance of industry, they should never be punished for idleness; this interpretation would

practically exclude compulsion altogether. On a narrower basis, Mill's statement means that there is a period now reached in Europe and North America when discussion takes the place of compulsion and people know what is good for them; thus compulsion may be set aside. Stephen interjects that such a period has not been reached yet. He asks where in the most civilised communities will one find a class of persons whose views and conduct are regulated by the results of free discussion? He repeats that the lion's share of results is obtained due to compulsion; changes are brought about by force, not discussion. For mankind is such that there will always be an "enormous mass of bad and indifferent people" and the only way that it is possible to act upon them at all is by compulsion or restraint; the utmost liberty would not improve them. It is submitted however, that he has here failed to recognise that a degree of personal liberty was necessary before those who act by compulsion were themselves able to formulate ideas and philosophies upon which their subsequent deeds were based.

Stephen avers that Mill fails to show that coercion is itself bad, but proves only that it has bad effects. In fact, he reminds us, religion and morality are coercive systems. Both were established by word of command, for example by military power or threats as to a future state. Stephen sees nothing wrong in this, for the morality of the vast majority of mankind, he claims, is simply to do what they please up to the point at which custom puts a constraint

upon them, arising from fear of disapprobation; therefore the custom of looking upon certain types of conduct with aversion is the essence of morality.

In relation to morality, Stephen suggests that the only moral system complying with Mill's principle would be[92]

> 'Let every man please himself without hurting his neighbour;' and every moral system which aimed at more than this, either to obtain benefits for society at large other than protection against injury or to do good to the person affected, would be wrong in principle.

According to Stephen, this statement of principle would condemn every existing system of morals, for positive morality is simply a "body of principles and rules ... by which certain lines of conduct are forbidden under the penalty of general disapprobation" irrespective of self protection. Morality is a prohibitive system which imposes on everyone a standard of conduct and sentiment and the effect of such system far exceeds the purposes of self protection. In fact[93]

> The condition of human life is such that we must of necessity be restrained and compelled by circumstances in nearly every action of our lives.

Mill would probably not disagree with these general observations. For the purposes of the self protection of society, the law and moral disapprobation in the proper sense are levied, whilst in the case of purely self regarding conduct which is nevertheless disfavoured, one must face the inconveniences caused by the disapproval of others. He

therefore readily admits (without lending approval to) the existence of constraints exceeding the limits of self protection.

(b) Liberty of Thought and Discussion

In relation to the second issue, liberty of thought and discussion, Stephen reduces Mill's propositions to four statements which he expresses thus:[94]

> (1) No one can have a rational assurance of the truth of any opinion whatever, unless he is infallible, or unless all persons are absolutely free to contradict it.
> (2) Whoever prevents the expression of any opinion asserts by that act that he has a rational assurance of the falsehood of that opinion.
> (3) At the same time he destroys one of the conditions of a rational assurance of the truth of the assertions which he makes, namely, the freedom of others to contradict him.
> (4) Therefore he claims infallibility, which is the only other ground on which such an assurance of the truth of those assertions can rest.

Stephen finds himself in disagreement with the first two. In relation to the first statement he responds that[95]

> ... there are innumerable propositions on which a man may have a rational assurance that he is right whether others are or are not at liberty to contradict him, and that although he does not claim infallibility. Every proposition of which we are assured by our own senses, or by evidence which for all practical purposes is as strong as that of our own senses, falls under this head.

This latter qualification is somewhat tenuous and lacking in clear definition and seems in the last analysis to rest on little more than the self assurance of one's own intuition. With respect to the freedom to contradict

an opinion: he concedes that if people are compelled to accept a proposition it is difficult to infer its correctness merely on the basis of their acquiescence. This seems self evident, for support cannot be claimed from something that one is not prepared to countenance. Stephen continues to say that the evidential value of their acquiescence may be very small anyway, and the weight of other evidence, independent of public opinion, may be overwhelming. Also circumstances may be such that there is little likelihood of further evidence arising. This might be appreciated more clearly if he had indicated what he understood by "other evidence" that may be so "overwhelming" for ultimately the value of any evidence rests upon its reception by the majority as being correct.

With regard to the second proposition, he states that an opinion may be silenced without any assertion by the prosecutor that it is false. It may be suppressed because it is true, or because it is doubtful whether it is true or false and it is not desirable that the issue be discussed. In these cases there is obviously no assumption of infallibility in suppressing it. As an example, he cites the acts of Henry VIII and Elizabeth I in silencing (to a certain extent) both Puritans and Catholics - in so doing they were making no assumption of their own infallibility or claiming one particular opinion to be false, but merely limiting a religious controversy to obviate the possibility of a civil war.[96] It must be questioned here whether, as

stated, this principle which is really little more than one of expediency, does not create a dangerous basis for government. To utilise political power for a purpose that is not even acknowledged to be right or good, is highly dubious to say the least.

Stephen concludes that the first proposition, concerning the assumption of infallibility, will not apply where moral certainty is attainable on the evidence, although there is a conspicuous absence of any supporting examples.

Alternatively, with respect to the claim that all persons should be free to contradict an opinion, and the second proposition that the stifling of an opinion implies "a rational assurance of the falsehood of that opinion"; where moral certainty is not attainable on the evidence, then there is no claim to infallibility, nor is there an assertion of its falsehood, as the claim by definition does not assert the falsehood of the opinion suppressed.

This might be met with the response as to whether suppression here can be justified? The answer is that Stephen's position is based firmly upon the belief that the government generally knows the best interests of its subjects, for it is on this premise that his coercive model rests. Where then, moral certainty is not attainable, obviously it is impossible to assert incontrovertibly the falsehood of the opinion suppressed; however, it is assumed under Stephen's theory that a government is more likely to be right than wrong and that it should enjoy the benefit of any doubt in

this regard, which of course is the point of crucial divergence from Mill.

An important assertion in Stephen's thesis is that unlimited freedom of thought and discussion produces general scepticism and few benefits. In stark contrast to Mill, he claims that[97]

> If you want zealous belief, set people to fight. Few things give men such a keen perception of the importance of their own opinions ... as the fact that they have inflicted and suffered persecution for them. Unlimited freedom of opinion may be a very good thing, but it does not tend to zeal, or even to a distinct appreciation of the bearings of the opinions which are entertained.

Thus Mill would require liberty as a precondition to a critical dialogue from which an intelligent apprehension of the truth may be obtained. Conversely, Stephen establishes a case for coercion as being a virtue but then adds that even from opposition to coercion, worthwhile results are derived. This is saying in effect that if coercion is sufficiently strenuous, dissidents will respond to this repression by adopting a more vehement adherence to their own beliefs. Presumably then, under a coercive system opinions so formulated, whether truthful or false, remain persecuted, which in turn generates a sense of outrage and fervour, in a self defeating circle. This is perhaps one of the least attractive aspects of his theory for it seems to vest the authority of the State with a rigidly unyielding countenance, which is directed indiscriminately towards any attempted change. Such a formula is calculated to convert

zealous reformers into insurrectionists.

Stephen says that Mill has too favourable an estimate of human nature, when, for example, he claims that the removal of restraint invigorates character. Habitual exertion, Stephen argues, is the greatest agent for strengthening character - restraint and coercion are its necessary stimulants. Thus[98]

> A life made up of danger, vicissitude and exposure is the sort of life which produces originality and resource.

Yet if the coercion is designed for good ends, then the originality and resource he speaks of is by necessary implication for a bad end. In fairness, this criticism must be read subject to one exception, namely, that as Stephen himself admits, the "good" which the majority strives after may not be infallibly good and it therefore follows that the majority may indeed be wrong. Accordingly, the opposition to the coercive system in this case may be calculated for good ends.

In reply to Mill's discourse upon "Individuality as one of the elements of well-being", Stephen suggests that the growth of liberty in the sense of democracy tends to diminish originality, for if all are equal, each unit is "feeble in the presence of an overwhelming majority". Therefore[99]

> The existence of such a state of society reduces individuals to impotence, and to tell them to be powerful, original, and independent is to mock them.

A further reservation that may be added here is that even in the face of unlimited freedom, one still has to

contend with the innate tendency of mankind towards uniformity which Mill so readily recognised.

Stephen lays down three principles to determine when compulsion is to be regarded as bad. These are[100]

(1) When the object aimed at is bad.
(2) When the object aimed at is good, but the compulsion employed is not calculated to obtain it.
(3) When the object aimed at is good, and the compulsion employed is calculated to obtain it, but at too great an expense.

In the case of compulsion as applied to thought and discussion, Stephen would determine its correctness on the basis of these criteria, whilst Mill would condemn it in all cases. Stephen asserts that there are cases of coercion of which the object is or may be good, and the coercion is likely to be effective and there is not an evil great enough to counterbalance the evil which is avoided or the good which is attained. Therefore governments should exercise this power on such religious, political and moral principles as they from time to time regard as most likely to be true. An interesting contrast is drawn between passive coercion, for example, a government refusing to financially assist those religious schools of which it disapproves, and actual criminal sanctions. Whereas Stephen's formula would seem to support arbitrary rule, it is at least a practical basis upon which to govern society; Mill would disagree for he would undoubtedly plead that we should be aware that in making such judgments we may be mistaken in assuming their correctness and prove to be causing harm to those judged

wrong for no other reason than that it gives expression to the prejudices of the rulers.

(c) Liberty in its application to Morals

In the light of the foregoing discussion it is now possible to approach Stephen's attitude towards liberty in its application to morals. He comments that[101]

> The excessive harshness of criminal law is also a circumstance which very greatly narrows the range of its application. It is the ratio ultima of the majority against persons whom its application assumes to have renounced the common bonds which connect men together.

In this, Mill would possibly find little with which to disagree for he wholeheartedly supports the use of the criminal sanction where society would otherwise suffer injury.

The basis upon which compulsion generally is to be regarded as good or bad is also adopted for evaluating the advisability of moral legislation. The object of morally intolerant legislation is[102]

> ... to establish, to maintain, and to give power to that which the legislator regards as a good moral system or standard.

This should not be read alone, for on Stephen's thesis the legislator is not given carte-blanche to fashion society in accordance with the dictates of his own conscience. Before an act is to be treated as a crime it ought to be definable and capable of specific proof and worthwhile to prevent even at the risk of inflicting great damage on those committing it. Thus if law is to put itself into opposition to a man's wishes, it is helpful if

the law has an ally in the man's conscience so that he knows and recognises that he is doing wrong. He claims that in any given age virtue and vice have meanings which for that purpose are quite definitive enough. Although this may seem to be arguable in modern times, it is submitted that it is correct at least insofar as there exists a settled core of agreement as to the basic rules for the effective functioning of society, which fluctuates little from one age to another. Hart's so-called "universal values"[103] may be mentioned here, for example, respect of life and property. However, the further one moves away from these basic precepts in an attempt to create a more sophisticated fabric of rules, obligations and duties, the correspondingly more difficult it becomes for society to achieve any consensus on moral issues. Stephen envisages legal control of the more extreme aspects of human conduct, although there is a nebulous area in between where activities are neither definitively virtuous nor bad, and here perhaps he would not allow the legislator to enter. Stephen's model therefore does not appear to contemplate a complete enforcement of morality, in fact he attests to the limits of useful interference with morals by law and opinion, namely, that it should not be meddlesome, it should not proceed upon imperfect evidence, legislation ought to reflect current social attitudes and finally, legislation and public opinion ought to respect privacy.[104]

Samek draws a rough parallel between Stephen's conception

of privacy and Mill's notions of self regarding acts, although he admits that the former is manifestly intended to be more restrictive than the latter.[105] More important though, it seems that the desirability of respecting privacy is a factor that must be weighed by the good legislator but which, because of its vagueness does not compel him to reach a specific conclusion. However, Mill asserts dogmatically that the legislator must not out of principle intrude in certain fields, and a respect of the individual's privacy is one of them.

Stephen's self confessed limitations are reinforced by his utterance that an act should be of such a kind as to warrant the infliction of great damage upon its perpetrators, and that "These conditions are seldom, if ever, fulfilled by mere vices".[106]

For Mill, the only area of conduct that can justly be punished is where society would suffer a perceptible hurt; anything else which meets popular disapproval should be left to the conscience of the agent. In contrast, Stephen clearly brings certain spheres of unpopular conduct within the ambit of social control; accordingly with the "grosser forms of vice" punishment is imposed inter alia, to gratify the community's hatred for such offences and to express their desire for revenge. Law gives expression to the anger excited in the healthy mind; vengeance affects legal punishment, which will increase or diminish according to the degree of wickedness. Thus

some acts are so gross that, self protection apart, they must be prevented at any cost to the offender and punished with the utmost severity.

Is society justified in making this judgment? Stephen would undoubtedly think so, and it can certainly be supported from his own statements of principle. Firstly,[107] the principles and institutions of society are said to express not merely the present opinions of the dominant section of the community, but the accumulated results of centuries of experience which provides a standard against which to try the conduct of others. Secondly, he asserts that where the public feels a deep sense of outrage at something, "if the law of the land did not deal with it, lynch law infallibly would".[108]

The first observation seems to reach a point of almost reactionary conservatism; what has eluded Stephen here is that society is subject to constant change. Popular attitudes and sentiments cannot always claim to be grounded in the dogma of past values, and therefore an attempt to fetter one to the other is to distort the process by which new ideas are allowed to develop. The second point is sufficient to cover fundamental infractions of society's moral code, but it would be quite erroneous to endorse Victorian standards against a twentieth century background and to assume, for example, that what Stephen termed "unnatural vice" and similar offences, would now attract such opprobrium as to justify exemplary punishment.

Here, it seems that that which may have been inimical to nineteenth century morality is far less so to today's values. Further, the law will often not change as quickly as society's moral code with the resulting effect of causing harm to certain interests, for example, homosexuals in the 1950's who perhaps were legally discriminated against, in the face of a general decline in social disapproval towards them.

At this juncture it seems pertinent to comment upon the difference in approach between these two writers. Mill, it should be remembered, frames a thesis which is unspecific and extremely general in its theme. Stephen, on the other hand cannot be accused of being completely doctrinaire; for example, he refuses to commit himself to a general principle as to whether or not liberty is good or bad, but proceeds in a "far more cautious way" to see what experience has suggested in particular cases. He attempts to reconcile his theory and criticisms to social realities. Accordingly, his frequently penetrating criticism reflects a closer analysis of the practical implications of Mill's doctrine. Undoubtedly his task is made easier because such broad statements of principle as exemplified in Mill's writings, seldom cater for the nuances of practical situations.

Stephen's attempt to show that the criminal law acts as a "persecution of the grosser forms of vice" and that it does not merely prevent suffering or harm, has been attacked by Professor Hart. Stephen's argument is that in determining

the appropriate punishment, the degree of moral wickedness of a crime is always relevant. From this, Hart claims, Stephen made the unwarranted inference that[109]

> ... if we attach importance to the principle that the moral difference between offences should be reflected in the gradation of legal punishments, this showed that the object of such punishment was not merely to prevent acts 'dangerous to society' but 'to be a persecution of the grosser forms of vice.'

Thus vice may be restrained as being a bad thing irrespective of the question of self protection. Hart argues that Stephen failed to perceive the distinction between the questions "what sort of conduct may justifiably be punished?" and "How severely should we punish different offences?" To admit that the severity of punishment may be adjusted according to the moral gravity of the offence is not by extension to accept that punishment for immorality is justified,[110]

> For they can in perfect consistency insist on the one hand that the only justification for having a system of punishment is to prevent harm and only harmful conduct should be punished, and, on the other, agree that when the question of the quantum of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment.

Devlin responds by denying that these are independent questions at all, but are no more than "a division made for the sake of convenience of the single question 'What justifies the sentence of punishment?'"[111] The justification

he claims, rests in the law, for one cannot find a law which is not concerned with a man's morals but permits him to be punished for his immorality.

It is submitted that Devlin has the stronger case here, for as has been mentioned earlier[112] if morality determines the gravity of the offence, it seems an irresistible inference that morality will similarly determine the nature of an offence as well. Thus, to take the example of theft, it cannot be argued consistently that there are, according to the surrounding circumstances, varying degrees of iniquity attached to different types of theft and yet that the concept of unjustifiably depriving another of property is morally neutral. In other words, an attempt to quantify moral guilt must flow from the initial belief that the subject under review is immoral. Morality, it is felt, is a continuous process, beginning with the creation of an offence and ending with its punishment.

Hart expresses his scepticism of Stephen's picture of society and its moral mechanisms, particularly his suggestion that there is a moral code in sexual matters supported by an overwhelming majority who are deeply disturbed even by infringements in private. Nevertheless, assuming this to be a realistic appraisal, he poses the following question:[113]

> Can anything or nothing be said to support the claim that the prevention of this change and the maintenance of the moral <u>status quo</u> in a society's morality are values sufficient to offset the cost in human misery which legal enforcement entails?

There are, he asserts, various propositions concerning

the value of preserving social morality which are in danger of confusion.

Firstly, there will always be much in social morality worth preserving insofar as it provides for such "universal values" as individual freedom, safety of life and so on. With this Stephen would no doubt agree. Hart proceeds however to warn of the dangers of extending this theory to regarding social morality as a "seamless web" with all its provisions as being necessary for the existence of society.[114] Whilst the essential values must be secured, he invites us to be alive to the truth that society can "not only survive individual divergencies from its prevalent morality, but profit by them", a statement which Mill would wholeheartedly endorse. Conversely, Stephen it is assumed, would beset such "individual divergencies" with social control and coercion, secure in the knowledge that they would, if nothing else, serve as "astringents" and assist zealous belief in such non-conforming opinions. Of course this is not to claim that Stephen would be intolerant to every manifestation of individual expression, but if they attracted sufficient hostility that they were regarded as subverting "a good moral system or standard" then he would justify the use of criminal sanctions. One may envisage that public attitudes towards homosexuality in many ages would have rendered it punishable under this principle.

Secondly, after applauding the human attributes which are necessary to sustain a social morality, Hart is at

pains to distinguish from this mere moral conservatism, which he defines as the maintenance of the moral status quo at any point in a society's history. This is condemned as a brute dogma. We are reminded that a social morality should be maintained not by coercive authority, as enshrined in Stephen's system, but by advice, argument and exhortation, in brief, the very alternatives on which Mill had placed such emphasis.[115] However, Stephen would surely reply that one may exhort and advise as much as one likes but the words will in all probability fall upon deaf ears; Hart's suggested alternatives can only be viable in a situation where others will benefit from free and critical discussion, and Stephen clearly does not contemplate this as being a realistic account of contemporary society.

Lord Devlin

Various features of Stephen's critique were substantially reiterated by Lord Devlin in his Maccabaean Lecture before the British Academy in March 1959. This was followed by a series of lectures spanning the years 1959-64, which were collectively published under the title "The Enforcement of Morals".[116]

There are notable similarities between Stephen and Devlin, which are made all the more interesting due to Devlin's admission that the Maccabaean Lecture was originally intended to support the Wolfenden Report's statement of principle on the functions of the criminal law in matters of morality. In fact, further examination lead him to the opposite

viewpoint. Further, he asserts that he was unaware that much the same ground had been covered by Stephen in "Liberty, Equality, Fraternity"[117] with which he did not become acquainted until much later.

1. Devlin's general statement of principle

The Maccabaean Lecture entitled "Morals and the Criminal Law" outlines Devlin's statement of principle, and the subsequent lectures serve to expand it to specific areas such as the law of torts and family law.

It should be noted from a background perspective, that his theory proceeds from a search for a secular basis upon which to govern society. This is particularly evident from a later lecture on "Democracy and Morality".[118] Here, Devlin observes that following the decision to admit freedom of conscience, all the questions hitherto settled by the divine law as pronounced by the Church were thrown open to debate. Thus, when the law seeks to divide right from wrong, it cannot appeal to any absolute authority outside itself. To this one might add that even in an age of widespread religious feeling, an authoritarian church is unlikely to claim to posit a universal conscience hence Devlin's view here may appear to be somewhat extreme. In the same essay he analyses the grounds upon which the State may legislate on matters of morals. Having rejected the Platonic ideal that the State exists to promote virtue among its citizens as "the paved road to tyranny" he turns to what is for him the acceptable proposition that society may

legislate to preserve its own existence. Here, the law maker is not required to make a value judgment between good and evil for the morals which he enforces are those moral ideas which are already accepted by society and which are necessary to preserve its integrity. He will assume the morals of his society to be good, but[119]

> ... he has not to vouch for their goodness and truth. His mandate is to preserve the essentials of his society, not to reconstruct them according to his own ideas.

However, it is submitted that this essentially involves an important choice; unless the lawmaker is to enforce every moral judgment of society, he must determine which particular morality to enforce, which seems tantamount to reposing an authority akin to the Platonic model.

Therefore, Devlin's rejection of Natural law and religion as bases for the criminal law leads him to seek a secular justification which he finds in the notion of a common morality.

The initial premise from which everything else is intended to follow logically is that a society of any kind is "a community of ideas" and that no society can hope to exist without shared ideas on politics, morals, ethics and so on. In order to create a society there must be a fundamental agreement about good and evil, and that agreement must be sustained, for if the agreement goes society will disintegrate. This agreement is what Devlin views as a "common morality", which is part of the "bondage"

of society. The extent to which this agreement may be enforced and the areas rightfully subject to its control provides the whole basis for his thesis.

Devlin develops his argument by seeking to establish that the criminal law (of England) has always concerned itself with moral principles, of which the history of consent as a defence is cited as an example. Consent, apart from limited exceptions such as rape, cannot be used as a defence to a crime. He deduces that if law was designed for the protection of individuals, there is no reason why a person should avail himself of legal safeguards if he did not wish to do so. One is unable for legal purposes to consent to an offence beforehand or exonerate it afterwards, because, in Devlin's estimation, the act is an offence against society. Accordingly, he comments that[120]

> ... there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.

It has been argued[121] that this view ignores the pluralistic nature of modern society for a man may belong to many distinct groups, each for a different purpose. For example, he may belong to a family for his domestic life, to a political unit for social order and national organisation, and to another group for religion, for man moves in several societies and his membership in the State may involve less of a common morality than his membership in some of the others. This criticism does little to

undermine Devlin's theory, but it does perhaps detract in part from the exclusive attention centred upon the binding effect of social morality.

Alternatively, it should not be forgotten that the converse situation will also apply in that a society may exist without a moral consensus in certain important areas, for example, whether the use of so-called "soft" drugs should be removed from the criminal category; or whether abortions on demand should be lawful. It is submitted that as attitudes shift, there will always exist areas of controversy which may in themselves touch upon fundamental issues, for example, whether a foetus is, for legal purposes, a human being. Those arguing in the affirmative are committed to conceding that a limited right to murder is sanctioned by the legalisation of abortion. Further, in the case of "soft" drugs, for those who maintain that their use is detrimental to health, an affirmative response to its legalisation entails acceptance of an individual's prerogative to inflict personal injury upon himself, whilst implicit in a negative response is a recognition of a degree of paternalism sufficient to fetter personal discretion. In both cases, concepts fundamental to society's moral structure are involved. However, this does not mean that society no longer exists due to the uncertainty of its common moral principles, for in both of the examples, each side would be prepared to agree that murder or self injury are damaging influences; it is simply

a question of how and to what extent they should be curbed. The assumed postulates of right and wrong which form the basis of Devlin's common morality are not themselves under attack but rather their implementation and the extent to which one rule should override another, so that, for example, the legalisation of drug taking would imply that the virtue of individual liberty should in this situation take precedence over the wrong of causing injury to one's person.

Support for Devlin's insistence upon the pervasiveness of morality may be drawn from Eugene Rostow[122] who observes that morality is in fact a continual and inevitable feature of most legal and social activity. All movements of law reform, he claims, seek to carry out certain social judgments as to what is fair and just in the conduct of society. Hence, an old age pension is in fact an enforcement of morality. Similarly, the income tax scheme may be said to embody a moral judgment upon the fairness of allocating the costs of society in accordance with ability to pay. This is a telling point: perhaps rather than envisaging the law maker as consiously acting against extreme anti-social forces on the basis of an ascertained collective judgment of what is or is not desirable for a community's continued existence, we should view him as being prompted at every level and in every action by a whole range of unspoken moral suppositions. This is particularly in accord with Devlin's thesis, but on the other hand it is not entirely

incompatible with Mill's. Mill does not deny the necessity for an effective government or legal system, nor would he be likely to deny the influence of moral principles, for without them no judgment would be possible. He would however put a restraint upon morality influencing the law to the extent that the latter is merely being used to mirror popular prejudices and to interfere with individual liberty. Income tax schemes and the like fall short of this, for Mill was the first to admit that members living in a community and enjoying its benefits, owe a fair return for the privileges received. Nevertheless, it is clear that in the last analysis, Rostow's observations lend significant support to Devlin's emphasis upon the role of morality, although of course they do not go to the length of suggesting that any breach of moral beliefs may be fatal to society.

It is now possible to turn to the three principal questions which are the subject of Devlin's inquiry. These are firstly: Is there a public morality?[123] (that is, has society the right to pass judgment on matters of morals?). Secondly, if society has such a right, has it also the right to use the weapon of the law to enforce it? Thirdly, if the law may be so used, in what circumstances should the State exercise this right?

The first interrogatory has already been answered earlier in this section[124] where it was shown that a common agreement about good and evil is vital to his theory, for without it, it is said that society will disintegrate.

Interestingly, this central premise is the mainstay of Devlin's thesis, and yet it is not at any great variance with the other writings under discussion. Even Mill indirectly recognises a notion akin to that of a shared morality in that he concedes society's right to self protection, thereby assuming the nucleus of established behavioural usage which even the social reformers may not tamper with. Similarly, as mentioned above[125] Hart expressly articulates a number of specific values which are necessary before any form of community existence becomes viable.

In response to the second question, Devlin claims that if the first proposition is securely established with all its implications, society has a _prima facie_ right to legislate against immorality as such. Thus the law may be used to preserve the common morality in the same way that it is used to "safeguard anything else that is essential to its existence". An established morality is said to be as necessary as good government and so the law can and should be used for the suppression of vice. In this situation no theoretical limits are set to legislation against immorality and accordingly he rejects any notion of an area of private morality, which the law may not enter: morality for him embraces both public and private spheres.

The third interrogatory is concerned with the implementation of his doctrine. Given that the law should be used to enforce the moral judgments of society it must first be asked how these judgments are to be decided. This is

resolved by adopting the standard of the reasonable man who is identified more specifically as the man in the jury box[126]

> ... for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.

Devlin is now able to place a definition upon immorality as being (for the purposes of the law) what every right minded person is presumed to consider to be immoral. He enters four important caveats to this.[127]

Firstly, nothing should be punished by law that does not lie beyond the limits of tolerance and that "there must be toleration of the maximum individual freedom that is consistent with the integrity of society." This, it is submitted, is an answer at least in part to the question of what principles should be used to distinguish when the law should enforce a moral judgment. Secondly, Devlin is cognisant that the boundaries of tolerance will vary from one age to another and that the law should therefore be slow to act upon prevalent moral standards, for the latter are quick to change and the law may be in danger of finding itself without popular support. Thirdly, he warns that as far as possible the limits of privacy should be respected, for this is at least a factor that should be taken into account. Finally, we are reminded that "the law is concerned with the minimum and not with the maximum", in other words, that moral standards are higher and more

exacting than those which determine the content of the criminal law.

Now that the general outline of Devlin's theory has been drawn, some important detailed criticisms may be raised.

2. Detailed criticisms of Devlin's theory

There has been little dispute over the reservations referred to above, with the exception of the first one, which has attracted considerable criticism, and it is to this that attention must firstly be focussed.

(a) The point of legal intervention: the criterion of intolerance

In making out a case for a limited right to freedom, Devlin is the first to recognise the difficulty of marking off the limits of tolerance. In a response that is strikingly similar to Stephen, he asserts that in this region one cannot ignore disgust and genuine reprobation; the reaction must, he warns, be deeply felt and not manufactured. One cannot ignore these elements, for[128]

> No society can do without intolerance, indignation and disgust; they are the forces behind the moral law ....

This compels him to admit that the correctness of standards arrived at on this basis resides not in some universal objective truth but on the simple fact that it is so regarded by the majority of the community. Thus, if the reasonable man believes a practice to be immoral and that no right-minded member of society could think otherwise, then for legal purposes it is immoral, irrespective of

whether it is right or wrong. This has led to the remark[129] that it is not clear whether, for an act to be made unlawful, it is sufficient that (a) it arouses disgust in the reasonable man, which is deeply felt and not manufactured, or (b) (as Devlin's own general statements of principle suggest) it is desirable to produce evidence that the act in question is likely to be socially injurious. It is submitted that for Devlin's purposes the two are largely co-extensive. An act may be regarded as socially injurious merely by virtue of its affront upon popular sensibilities, with its possible effects upon the common shared morality. In determining what stage the conduct has reached in terms of its social impact, disgust and outrage serve as two of the governing indicia.

Professor Dworkin[130] accuses Devlin here of "intellectual sleight of hand" in talking about "freedom" and "toleration" and "balancing of interests", which Devlin claims should be borne in mind only when the public outrage is overstated and feigned. For, when this sense of outrage is genuine, the principle that calls for "the maximum individual freedom consistent with the integrity of society" no longer applies. So it appears that in fact nothing more than passionate public disapproval is necessary to create a criminal offence after all.

This may be met with the response that Devlin is talking about outrage at something which is identified as socially damaging in contradistinction to disapproval of that which

is not regarded as harmful. Accordingly the reasonable man test is tendered as a safeguard to distinguish the two instances. However, it must be admitted that in practice this distinction may not always be perceived with clarity.

This area of Devlin's theory has attracted the further criticism[131] that it becomes difficult to reconcile the limitation of toleration with his justification for the use of criminal sanctions (to preserve a common morality in order to maintain society's existence). Logically it would seem that the limits of toleration should be set by reference to the degree of essentiality of each moral precept. But on Devlin's model, it is claimed, this is not so, for the criteria he furnishes are intolerance, indignation and disgust, and there is no necessary correlation between these and the destructive influence of that conduct on society. The example is cited that people may be disgusted at a man allowing his dog to foul the sidewalk, but there may be no strong emotional reaction to the bribery of public officials.

There is some validity in this criticism, but it seems to have been taken to exaggerated lengths by its reliance upon the aspect of emotional response. Devlin envisages the toleration of particular behaviour until society can no longer be called upon to sustain it. The clamour of popular distaste, albeit in emotional terms, is in fact the articulation of the hitherto tacit common agreement as to right and wrong upon which society is based. Thus petty offences such as fouling the sidewalk may cause a certain

outcry, but it would most likely be denunciation about something which is recognised as being merely antisocial rather than socially damaging. Conversely, the disgust, intolerance and indignation that Devlin generally envisages are sentiments about things which are regarded as harmful to society's existence. What is being assumed in the criticism is that bribery is more iniquitous and socially harmful than the fouling of a footpath, this being based upon an objective moral gradation of offences, which is generally absent from Devlin's thesis. It must be remembered that Devlin does not assume any universal scale of values, for it is the strength of the creed that is the determinant of what is to be prohibited, rather than its objective status. Also this is to ignore the point of Devlin's argument - it is because an act of bribery is not in itself considered to lead to the destruction of society that the desire for its vigorous regulation by the criminal process may be relatively weak. However, if the bribery of public officials was so rife as to severely undermine the system of social administration, it is not unforeseeable that the majority would become sufficiently disturbed at these practices to demand remedial measures - thus the limits of toleration would then have been reached.

The discussion so far in this section has been concerned with the detailed question of how Devlin determines when legal intervention in the field of morality is justified. At a much more general level, it must be pointed out that

the ambit of Devlin's theory is so comprehensive as to leave very few areas where legal scrutiny is barred. This feature must be examined, for as will be discussed in the next section[132] it has led to the accusation that his system is unable to respond to social change.

Devlin's notion as to the rightful scope of the criminal process may be seen clearly from his criticism of Mill. In responding to the problem as to the interest which society may claim in the individual's physical, mental and moral fitness, Mill admits that each person owes a duty to assignable individuals or classes (for example, his family and creditors) but not to society at large. Predictably, Devlin goes considerably further than this by claiming that if, apart from his assignable obligations, a man fails to observe a standard of health and morality, society as a whole is impoverished through the deficiency of his contribution to the common good.

Again, Mill's conception of liberty is attacked by Devlin along the lines of social expediency - he feels that its weakness in practice is that it enables one man in a hundred to impede projects which would benefit the other ninety nine, and that there will always be a troublesome minority who will yield only to compulsion. This is elaborated with an example of a hypothetical group of one hundred people, ninety of whom are virtuous and ten are vicious. Are the ninety to be expected to tolerate the pernicious few? The hopelessness of controlling and

eventually converting vice by example and good works is seen from the fact that no secular society has yet achieved this. Devlin is speaking as a lawyer who has been involved with the practical workings of society, whereas Mill's standpoint is taken on a philosophical plane without undue concern for the mechanics of society. From Devlin's level such argument against complete tolerance as envisaged by Mill is undoubtedly right.

It follows from Devlin's doctrine that even private vice cannot be ignored as being harmless to society; for if in the process a sufficient number of people become physically and spiritually damaged they cease to be useful citizens and thereby weaken the community.[133] On the other hand, when considering intangible injury to society through things which attack and undermine the shared morality, it is the moral belief and the conviction with which this morality is held that becomes the relevant factor. It should not be overlooked that Devlin is not stressing the quality of a creed but the strength of belief in it; this strength gives binding force and cohesion to the common agreement about right and wrong. It is not error he fears, but indifference.

One of the most salient problems to result from vesting the State with such a wide discretionary authority is that it appears to be quite incapable of responding to legitimate pressures for social change. This aspect will now receive more detailed examination.

(b) The inflexibility of an enforcement of morality doctrine

Devlin contends that if no particular morality is inherently good and the force of belief is the important factor, then one morality could be exchanged for another providing it is equally regarded as being right by the community. "Why then is the law used to safeguard existing moral beliefs?" he asks. In reply to his own question he states that in order to achieve the necessary degree of belief in the new morality, the old system must be driven out by disbelief, presumably of a sufficient intensity to vest the substituted morality with as powerful adherence as the old. On this model, the law serves to protect an existing morality from unwarranted change (a desire for change unsupported by a sufficiently powerful belief). During the transition there will be a period of disbelief in either the new or old system until one is decisively rejected and the other decisively adopted, for "it is the interregnum of disbelief that is perilous".

This argument can at least claim the merit of having recognised that the process of social change is not instantaneous. There is a period when old values are questioned and experimentation, questioning and argument are necessary preliminaries for a new approach. But if the law seeks to maintain existing standards until reform has gathered sufficient momentum to take their place, this begs two questions. Firstly, at what stage does the existing system yield to the new? It is tempting to

envisage a whole body of moral belief being suddenly jettisoned and another being acquired in the same instant. Devlin realised that this is not possible, but it still does not answer the question: when and how does legitimate change take place under a coercive system? Secondly, if law is to safeguard existing standards, it is very questionable whether, in the way it has been formulated, it will possess sufficient flexibility to do so whilst allowing new beliefs and attitudes to be fostered and acquired with the sufficient zeal necessary to permit change. In short, Devlin's overall scheme is suggestive of an extreme moral conservatism without providing any realistic scope for experimentation based upon critical examination of existing social practices.

Devlin anticipates the objection that rather than wishing to subvert a whole morality, one may wish only to affect peripheral changes. In reply he asks whether it is possible to determine what part of our morality is to be left unguarded and exposed to change?

Devlin adds that in practical terms, the law never embraces the whole of public morality anyway. But even if it did, then contrary to Hart's claim that its effect would be to "freeze into immobility the morality dominant at a particular time in a society's existence"[134] he maintains that it would in fact serve to regulate the process of change and to differentiate those alterations prompted by a genuine search for moral improvement, and those which "are relaxation into vice". To this it may be said that

such a process is more visionary than an attempt at a realistic solution. It assumes a lucid perception of the motives and consequences of social reform, which can only be truly appreciated by hindsight. It is certainly not difficult to envisage any projected change being labelled a "relaxation into vice" by all but the most enlightened administration.

Further, as an indication of one's sincerity of motive, a willingness to suffer and to fight for a cause, Devlin claims, affords convincing proof. Opinions so held are respected and when they accumulate enough weight, the law is compelled to yield, for if it fails to do so it will be broken. A similarity with Stephen's approach may be discerned here, for both claim that social and legally organised resistance is worthwhile in that sincerity and zeal emerge triumphant from persecution. However, undoubtedly it is easier to assert this than to prove its veracity. Here possibly one should not lose sight of Mill's warning that such dissenting opinions may not only prove to be correct (perhaps "socially beneficial" is a better term) but that such truths do not always triumph over persecution.

Therefore, on balance, an enforcement of morality doctrine appears to be intractable and rigid, particularly at the level of its operation. This is principally because the social interest largely supersedes the rights of the individual, which of course is the reverse of the libertarian approach. The immediate effects of this may

not seem great, but in the long term, unless the sphere of public morality is considerably diminished, a real doubt must exist as to whether society can withstand what amounts to a system of enforced conservatism. As has already been stated,[135] Devlin is quite aware of this vulnerability in his theory, and avers that if the law is unable to respond to powerful lobbys for reform, it will be destroyed. Nevertheless, the task he has presented to representative elements such as the man in the jury box, to reflect the dominant shifts in public opinion is, to say the least, an onerous one.

(c) The Contemporary Social Reality

It must be questioned critically as to exactly what Devlin understands as the "Contemporary Social Reality", because this for him, is the embodiment of the public opinion that composes his important concept of a common morality. His analysis proceeds thus:[136]

> The pressure of opinion that in the end makes and unmakes laws is not to be found in the mouths of those who talk most about morality and reform, but in the hearts of those who continue without much reflection to believe most of what they learnt from their fathers and to teach their children likewise. What they believe may be quite wrong; but it is quite contemporary and quite real.

From this he concludes that[137]

> ... in a democracy the existing laws contain the best and most comprehensive statement of contemporary social reality.

The picture is thus a dismal one. The motivating forces behind the community emerge from the uninspiring

silent majority, but at least this is consonant with principle, for earlier he claims that it is not the quality but the strength of the creed that matters. Whereas Mill and Hart appeal to a search for truth for which liberty becomes an essential precondition, Devlin confronts the philosophically unattractive social reality that the dominant attitude of society is often no more than one of unquestioning conservatism which frequently continues simply through its own inertia. On this model, liberty for conducing an atmosphere of creativity is of little importance.

Manifestly such an approach has its drawbacks, and this lack of connection between morality and reason has led to one comment[138] that "Democracy then must be a democracy of feeling". This exposes Devlin's theory to a dangerous avenue of criticism, namely, that there is a real likelihood of confusing morality with blank preference or prejudice. A possible rejoinder here is that current standards are predominantly valid because their continuance is attributable to their moral vigour. However, as Devlin has attested to the lack of intellectual discrimination in this process it remains equally true that unenlightened or arbitrary principles may freely pass from one generation to the next, together with the more desirable ones. Prejudice and intolerance are therefore not only encouraged by this format, but their preservation of actually being fostered. It is evident that this aspect of his theory is

far from satisfactory.

Now that Devlin's thesis has been stated, together with some accompanying critical responses, it is possible to discuss a number of specific questions which have been raised by Professor Hart.

(d) The Hart-Devlin dialogue

It is appropriate to start with the question "In what sense is a shared morality essential for society?" for it is central to Devlin's argument and his assumed basis for society's continued existence as a society. Hart asks firstly whether the assumption that immorality jeopardises or weakens society is a statement of empirical fact. If this is so, it is lacking in both historical support and indeed any kind of evidence that immoral conduct, even in private, threatens the existence of society. He observes that Devlin's approach seems to proceed from an "undiscussed assumption", namely[139]

> ... that all morality - sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty - forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole.

To this Devlin replies that he is not asserting that any deviation from the shared morality of a society will threaten its existence, but that a deviation is capable of threatening the existence of society, so it cannot be put beyond the law. This is only partially true, for it is submitted that there are some peripheral areas of the shared morality which can safely be abandoned as part of the

constant process of social change, without deleterious effects upon the community. The example may be cited of the problem of refused blood transfusions[140] particularly where children are involved. Perhaps a decade or more ago it would have seemed palpably negligent of any court not to overrule the refusal of a parent to allow a blood transfusion on a child in urgent medical need. Today opinion is not completely settled and such issues as the right to life, and freedom of conscience have been drawn into the vortex of controversy, the protagonists on both sides delivering powerful and articulate arguments in their respective causes. It may be conjectured that in the not too distant future this matter will have been resolved, not necessarily to everyone's satisfaction, but in response to whichever emerges as the most powerful lobby of opinion. Let us assume for the sake of argument that it is decided that for judicial purposes the wishes of the parents will be the ultimate governing factor. Society would then have moved from an era when allowing a child to die in such circumstances would have been unthinkable to another period when it is regarded only as the regrettable consequence of a particular article of religious or ethical belief. Society would not have been destroyed in the process, and it is difficult to even envisage it as having changed in any substantial way; nevertheless a seemingly unshakable tenet of the common morality would have been completely eroded.[141]

Hart goes on to say that Devlin[142]

> ... appears to move from the acceptable proposition that <u>some</u> shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society.

In Devlin's view, the question whether such a change has occurred is a matter of degree. Nevertheless one may appreciate that Hart is drawing a valid criticism of his reliance upon preserving the existing morality. On the blood transfusion example one may observe the soundness of Hart's basic criticism.

This has attracted the comment[143] that Hart does not seem to have fully appreciated the fact that Devlin is concerned not with the enforcement of morality as such, but the protection of society as a "going concern". However, as has been demonstrated, it is possible for society to remain as a going concern despite periodic changes in its morality.

Hart is prepared to accept the former proposition that some shared morality is essential to the existence of any society, as being a "necessary rather than an empirical truth", but the latter proposition that a society is identical with its morality, he calls "absurd". Instead of the view that moral change is tantamount to the destruction of society, or at least to the notion that one society has disappeared and has been replaced with another, Hart rationalises a change in conventional morality as entailing not the destruction or subversion of a society but a change in its form that

is compatible not only with its preservation but also with its advance.

Devlin takes the approach that whether or not one system has disappeared and another has taken its place, depends upon the extent of the change. He implies that the changes would at least have to be fundamental. It must be remembered here that for Devlin, a society is denoted not merely by the physical fact of persons living together on a communal basis, but also by such persons generally regarding certain agreed moral principles as binding, thereby rendering a co-operative existence possible. Thus if a tribe of cannibals living in a jungle were to be proselytised by Christian missionaries so that their outlook, behaviour and philosophy were radically changed, then it seems that on Devlin's interpretation, a different society would have been created irrespective of the sociological fact that the same people have continued to live in the same group.

Devlin admits that if morality can be changed then so can the law, but although society is not being equated with the whole body of morality, there are no types of immorality which are in their nature incapable of threatening the existence of society, so that they cannot be regarded as being not the law's business.

Mitchell sums up the problem this way:[144]

> ... we do not know just how much cohesion is necessary for a society to exist, but we do know that some cohesion is necessary. Some degree of shared morality is essential to this minimum of cohesion, and any weakening of moral belief may reduce it below this

> minimum; hence we cannot bind ourselves not to use the law to safeguard existing moral beliefs, no matter how peripheral they may appear to be.

It is submitted that this is an accurate paraphrase of Devlin's position; its weaknesses have already been discussed with particular reference to the changes in values and the application of those values which occurs inevitably as society develops.

The deduction has been made[145] that if, on Devlin's model, it is claimed that generally practised immorality will harm society, then this serves only to show that society has a right to suppress immorality if it is generally practised, and not that it has the right to suppress immorality as such. To arrive at the latter position it is necessary to establish that whenever immorality is allowed, it will grow to dangerous proportions. But it is submitted that Devlin circumvents such possible criticism by recognising this approach but deferring its application; as an initial postulate, a different criterion is provided, namely, that "it is the nature of the subject-matter that is the determinant" and (by implication) it is not its effect. For in fact, Devlin draws a distinction which has been overlooked between "whether society should have the power to restrain any activity" (which will depend upon its nature and its moral standing) and whether that power should be exercised at any given time (which will depend upon its estimated danger to society and its damage to the freedom of the individual). Thus, in practical terms, the suppression

of immorality involves two stages of reasoning: firstly, the judgment as to whether particular conduct is to be regarded as immoral, and secondly, in the event of an affirmative answer, whether at a given time in a society's history it has assumed significant dimensions to warrant its proscription. As Devlin observes, the line[146]

> ... is a practical one, based on an estimate of what can safely be tolerated whether in public or in private, and shifting from time to time as circumstances change.

Both Devlin and Hart accept that some shared morality is essential to the existence of any society, but they understand it in different ways. Devlin seems to be saying that for society to exist there must be some shared moral principles. It may be useful to reiterate here his statement that[147]

> What makes a society of any sort is community of ideas ... ideas about the way its members should behave and govern their lives; these latter ideas are its morals. Every society has a moral structure as well as a political one....

On the other hand, Hart seems inclined to the view that there are certain moral principles which any society, in order to survive, must recognise: these principles are specific and lay down necessary basic rules for civilised existence:[148]

> ... all social moralities, whatever else they may contain, make provision in some degree for such universal values as individual freedom, safety of life, and protection from deliberately inflicted harm ....

This aspect is elaborated in his earlier book, The Concept of Law,[149] where he talks of a specific

minimum content in law and morals as being necessary for the survival of society. In other words, the natural conditions of human beings (that is, their weaknesses and vulnerabilities) dictate a minimum moral content for the law; this nexus is, for his purposes, not an empirical or factual one, but is based upon the conscious aims of man to survive in a social unit.

The strict limitations to the inclusion of moral factors in Hart's doctrine must be carefully emphasised. In an earlier paper[150] he stresses that the connection between law and morality is a fortuitous one based upon certain natural necessities, as exemplified by his "universal values". Therefore morality is not automatically an integral part of law, but as a minimum condition, Hart claims that law should enshrine certain basic moral precepts which are necessary to make <u>any</u> form of community existence possible. Therefore, a sharp distinction must be drawn between the role of morality in Hart's thesis and its function in Devlin's model.

By a curious coincidence, both writers would maintain that morality is essential to the survival of society, but this is understood in fundamentally different ways. In contrast to Hart's position, Devlin expands the operation of morality through his notion of society as a community of values so that it embraces almost the entire spectrum of human activity. For Devlin, <u>every</u> social value is potentially fundamental and cannot therefore be left beyond the pale of the law, whereas Hart is concerned with a minimum of rules,

which in practice would affect only other regarding acts.

Within Devlin's theory certain of Hart's "universal values" are likely to be found. However, the scope of Devlin's values are much wider, for he is concerned not only with such basic obligations as the respect of individual freedom and safety of life, but also what is regarded as good and bad by the bulk of public opinion irrespective of its actual physical impact upon society. Accordingly, on Hart's approach, breach of the moral code may not in itself warrant sanctions unless one of his particular values has been infringed, whilst on Devlin's theory it may be rightfully proscribed through being damaging to the shared morality without having necessarily caused any tangible injury.

In this chapter, a discussion of the enforcement of morals was initiated with a review of the 19th century jurist Sir James Fitzjames Stephen's "Liberty, Equality, Fraternity". This was followed by a commentary of "The Enforcement of Morals" which had served in part to endorse Stephen's thesis against a 20th century background. Devlin's writings prompted considerable controversy and analytical questioning, not least from Professor Hart, who raised the debate to a probing and at times highly academic level. Perhaps now that the dust has settled somewhat, it would be useful to conclude this section with a few remarks as to where, finally, the areas of difference and agreement lie between the latter protagonists.

Firstly, it seems to be a legitimate comment[151] that

both writers are obsessed with punishment in the criminal law as a mode of enforcement, thereby disregarding the techniques of non-recognition (for example as applied to gaming contracts) and nullification (for example, illegal contracts) familiar to the civil law. Thus it may be argued that the institution of monogamous marriage may be quite sufficiently protected by virtue of the non-recognition of polygamy, without the necessity of sending the bigamist to prison. However, in practical terms this is of limited significance because non-recognition is of course a negative response, whereas the vast catalogue of crimes require prohibition through direct intervention. Accordingly, the non-punitive measures suggested have no impact upon most of the accepted areas of criminal responsibility nor the controversial spheres such as abortion, drug taking, prostitution and the like.

Secondly, the fact should not be obscured that Devlin's approach is one of "striking a balance between the rights and interests of society and those of the individual". Accordingly, all the appropriate interests must be weighed and he points out that the individual has locus standi in this process for "he cannot be expected to surrender to the judgment of society the whole conduct of his life".[152]

Hart's approach is generally similar. His conception of individual liberty involves, at least, an acceptance that the individual may do what he wants in private even if others are distressed when they learn of what he is doing -

distress caused merely by the bare knowledge of his conduct is insufficient to warrant its prohibition. However, protection from shock or offensiveness by a public display is regarded as a different matter.

This desire for a balancing of conflicting interests is certainly a common ground; indeed the two doctrines also converge at other points so that the difference between them is sometimes remarkably narrow. For example, Hart concedes the notion of paternalism, at least to the extent of protecting individuals from inflicting physical harm upon themselves. Devlin recognises society's right to enforce morals subject to certain practical limitations which have been outlined above,[153] for example, it must reflect the standards of the average citizen, also toleration within reasonable limits is called for, and privacy should as far as possible be respected. It is submitted that in terms of application these two arguments will support policies of marked similarity. The effective difference would rest solely on motive; in the first case one may not purport to act upon a moral principle, whilst in the second, this is avowedly permissible. As has been stated earlier,[154] at this level it becomes extremely difficult to segregate the issue of morality and moral judgment from the other factors which make up the decision to intervene (primarily the assessment of the potential physical harm to society or the individual).

Where then is the main area of divergence? It has been

suggested[155] that it centres around two particular interests: (1) the social interest in the general morals, and (2) social interest in individual self assertion. Devlin is prompted by the first and Hart the second. Or,[156] at a more general level, Hart's primary concern may be attributed to the individual, whereas Devlin's preoccupation is for society.

The real point of contact would seem to be this: that Hart upholds individual liberty as a necessary virtue (one writer[157] terms Hart's conviction of liberty as being "an absolute ethical value" although this perhaps is going too far) and its restriction calls for a justification; Devlin provides that justification in recognising that self interest is superseded by collective necessity. Hart, of course, does not deny this latter proposition, and the effective difference between them seems to rest basically upon their approach in bearing down upon the same problem. Devlin sees society as needing protection from debilitating and ultimately destructive forces, and his thesis attests to the justifications and necessities of acting against them. Hart, on the other hand, in advancing the elements of liberty and social freedom, requires a satisfactory explanation before they may be justly abandoned, and the crux of his argument, at least as far as Devlin is concerned, is that he simply is not satisfied that such a case has been made out.

CHAPTER FOUR

THE ISSUE OF JURIDICAL CERTAINTY

This chapter is concerned with an examination of the issue of juridical certainty. There appear to be few situations where this topic must be directly confronted; most judicial decisions involve a mechanical application of legal rules rather than an analysis of the underlying principles upon which the rules are based. It is for this reason that the judgments of the House of Lords in Shaw v. D.P.P.[158] and Knuller (Publishing, Printing and Promotions Ltd.) and others v. D.P.P.[159] have afforded a rare opportunity for a broad conceptual discussion and provided an insight at least into the climate of opinion within certain sectors of the judiciary.

It is submitted that these decisions result from an approach towards the enforcement of morality similar to that adopted by Stephen[160] and Devlin[161] and illustrate the objection that at the practical level the operation of their theories can involve considerable uncertainty. This criticism may indeed also be endemic to all enforcement theories because they deal with inherently subjective areas. The above cases serve to emphasise the discretionary aspect of criminal jurisdiction whilst underplaying the need for precision in identifying unlawful conduct. By virtue of this nexus, the strengths and weaknesses of these decisions reflect upon some of the difficulties of the enforcement of morality theories under discussion.

The facts of the case, in brief, were that the appellant

had published a booklet entitled "The Ladies' Directory" containing the names and addresses of prostitutes, which also in some cases indicated a willingness of the advertiser to engage in certain sexual perversions. The appellant received payment from the prostitutes for their advertisements. He was indicted on three counts, the second and third of which (living on the earnings of prostitution, and publishing an obscene article) are not particularly relevant to this thesis. However, the first count, "conspiring to corrupt public morals" aroused considerable controversy concerning the role of the courts in the area of public morality.

At first instance the defendant was convicted on all three counts, his appeal to the Court of Criminal Appeal was dismissed and he further appealed to the House of Lords, claiming, inter alia that there was no such offence at common law as a conspiracy to corrupt public morals. It was held (Lord Reid dissenting) that a conspiracy to corrupt public morals was a common law misdemeanour and that there was in the courts as custodes morum of the people, a residual power where no statute had yet intervened to superintend those offences which were prejudicial to the public welfare. In a classic statement of principle, Viscount Simonds asserted that[162]

> In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State ....

Authority for this view was traced back to such cases as

R. v. Sidley[163] where the King's Bench had pronounced the broad doctrine that the court was the custos morum of the king's subjects, and R. v. Deleval et al[164] where Lord Mansfield enunciated the dictum that[165]

> ... this court is the custos morum of the people and has the superintendency of offences contra bonos mores and upon this ground both Sir Charles Sedley and Curl who had been guilty of offences against good manners were prosecuted here.

Because of the very nature of this principle, Viscount Simonds conceded that the same acts may well be regarded differently from one age to another, such as heresy and blasphemy. Thus[166]

> The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society.

Viscount Simonds' view was endorsed by Lord Tucker[167] who cited with approval the definition of "unlawful purpose" in Kenny's Outlines of Criminal Law[168] as including acts which are not breaches of the law at all but are nevertheless "Outrageously immoral or else are in some way extremely injurious to the public". Lord Morris and Lord Hodson similarly affirmed that "the law is not impotent to convict those who conspire to corrupt public morals".[169]

Against this Lord Reid, in his strong dissenting judgment, bluntly denied that there is such a general offence known to the law as conspiracy to corrupt public morals, and claimed that to extend the offence of conspiracy to this case, the court would have to thereby create a new

unlawful act. This the court is not competent to do and in such matters he asserts that it is for Parliament to decide how far the law ought to punish immoral acts, for "When there is sufficient support from public opinion, Parliament does not hesitate to intervene ...."[170]

One of the consequences of holding that "this very general offence" exists is that it creates uncertainty, and here, Lord Reid felt, it is not satisfactory to seek recourse in a jury, for then the court will have[171]

> ... transferred to the jury the whole of its functions as censor morum, the law will be whatever any jury may happen to think it ought to be ....

It has always been thought to be of primary importance that, particularly in the criminal sphere, the law should be certain and that a man should be able to know what conduct is or is not criminal.

It is submitted that Lord Reid has laid down what at first sight appears to be two particularly cogent arguments against upholding the offence of conspiracy to corrupt public morals. These may be summarised thus: firstly the need for certainty in the criminal law is pre-eminent. Secondly Parliament is the proper forum for resolving the legal status of, for example, allegedly immoral acts and for creating new offences. How have these criticisms fared in the light of the Shaw case itself and the subsequent House of Lords decision in Knuller v. D.P.P.?

Firstly, Lord Reid's plea for certainty was not entirely unheeded even in the Shaw case, although Viscount Simonds

felt that the question of certainty arising from "the vagueness of general words" could safely be left to the jury to resolve, while Lord Morris thought that even if accepted public standards may vary to some extent from generation to generation[172]

> ... current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved.

For similar reasons, Lord Tucker regarded the jury as "the final arbiters in such matters". Neither comment, it seems, answers the problem of ascertaining what the views of the jury will in fact turn out to be in a given case and that therefore one could not predict in advance what is deemed criminal except by guessing what approach a jury will take. Nevertheless one may readily appreciate the comment of Lord Morris in the Knuller case, that[173]

> Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in.

However, it must be remembered that the conspiracy to corrupt public morals charge does not lay down a specific offence so much as a general category into which various forms of conduct may be placed. With this one may contrast, for example, the offence of murder which at its simplest level requires firstly the actus reus of a killing and secondly an accompanying mental intention on the part of the accused. Can a conspiracy to corrupt public morals be reduced to anything approaching this level of clarity? Clearly it

cannot. In terms of mental intent, firstly a conspiracy is required and secondly that conspiracy must be calculated to corrupt public morals. So it is extremely difficult to resolve what is likely to corrupt the public morals at any given time. It seems that we are here moving away from any objective terms of reference and entering an extremely subjective and undefined area. Unlike most fields of criminal responsibility where the effect of an offence is factually verifiably, such as murder or the various offences specifying degrees of bodily harm, there is no way of accurately evaluating the impact of this misdemeanour, hence its ultimate justification rests only upon the opinion of a selected few. However this is perhaps placed in less dramatic perspective when it is remembered that a considerable number of crimes such as manslaughter, sedition, criminal libel, public nuisance, criminal negligence and obscenity are imprecise for the same reason and in many cases it will be impossible to foretell in advance of judgment whether the particular act is prohibited or not.[174] Further, it seems that this doctrine has been applied in recent times only to the publication of certain kinds of literature, so that although it is expressed in the widest terms its actual use has been strictly limited. It is perhaps advisable that this extremely general offence should be invoked only in specific instances for it would otherwise offer juries an unparalleled opportunity to oppress anything which merely offended

their moral sensibilities.

Several of their Lordships seemed generally unconvinced by Lord Reid's approach on the basis that it is possible to clearly identify socially harmful conduct. The tenor of Viscount Simonds' and Lord Tucker's judgments clearly seem to assume this, and Lord Morris appears to have viewed it in a quite definitive perspective:[175]

> There are certain manifestations of conduct which are an affront to and an attack upon recognised public standards of morals and decency, and which all well-disposed persons would stigmatise and condemn as deserving of punishment.

It is submitted that the problem here is that such a notion of corruption may be easily expanded to cover situations where popular responses are entirely questionable. Therefore, Lord Reid's dictum legitimately raises some appropriate warnings. Their effect however is weakened, firstly, because there are also many other spheres of legal responsibility which are not without attendant uncertainty;[176] in fact, this offence merely raises in acute form a problem which occurs in almost every judicial decision to a varying degree. Secondly, in practice the offence has been given a strictly limited application and it may well prove difficult for a zealous prosecutor to break this pattern of usage by extending it to other areas.

Lord Reid's second argument was directed to whether the role of the court in this area should be conceded entirely to Parliament, particularly having regard to the suggestion

that the courts may appear to be vested with sufficient arbitrary power to create new heads of crime. To this, Lord Reid added the stricture that "where Parliament fears to tread, it is not for the courts to rush in".[177] It is submitted that at best, Parliament can only legislate in the broadest terms and that especially in areas of morality a high degree of discretion must necessarily be reposed in the tribunal of fact, which has to confront a possible array of quite novel fact situations from time to time. With regard to Shaw's case, as the majority of their Lordships stated, there is historical precedent for the existence of the offence of corrupting public morals, and thus the issue which arose in this case was simply whether the conduct of the accused, as a question of fact, fell within this particular category. However, this is not totally convincing because the supporting authority contained a number of cases relating to considerably different fact situations, which the court nevertheless decided to treat as being in pari materia.

With any indeterminate offence of this nature, there will always be a suspicion that it may be misapplied after the initial criticism has subsided. It is submitted that a conspiracy to corrupt public morals charge may perhaps be saved from abuse by prosecuting bodies and the courts if the following test were adopted: would any reasonable man consider that this particular conduct is so gross as to have gone demonstrably beyond the pale of reasonableness and to warrant

the reinforcement of popular censure with a legally enforced prohibition?

Also, theoretically at least, this offence is so broadly framed as to allow the law to become unduly meddlesome in moral controversies. In reply, there is at least the partial defence, as stated below,[178] that if the spectrum of such a wrong is not rigidly defined, at least it will possess the flexibility to deal effectively with diverse and unforeseen situations and thus the law will be able to keep pace with the criminal.

Further impetus has been given to the Shaw decision by the judgment of the House of Lords in Knuller v. D.P.P. which concerned the publication of a magazine containing advertisements inviting readers to take part in homosexual acts. The accused were charged and convicted on the first count of conspiring together and with the advertisers, to induce readers to meet the advertisers for the purpose of homosexual practices and to encourage readers to indulge in such practices with intent to debauch and corrupt their morals.

On this occasion, Lord Reid supported the majority in dismissing an appeal against conviction for, inter alia, conspiring to corrupt public morals. The reason for upholding the offence was paradoxically based upon a desire for maintaining certainty within the law (which was one of the most important grounds upon which he had opposed the doctrine) for the Shaw decision had been accepted as good

law since 1962, and therefore[179]

> Any alteration of the law as so determined must in my view be left to Parliament.

In the Knuller case, it was Lord Diplock who dissented to the principle enunciated in Shaw v. D.P.P. After an historical review he concluded that the earlier cases, despite the presence of some wide dicta concerning the jurisdiction of the court, were dealing with more specific offences than the one alleged in the instant case, and that[180]

> Your Lordships attention has not been drawn to any case decided in the next 100 years until Shaw's case itself, in which conduct has been held to constitute a misdemeanour at common law on the ground that it was contrary to religion, morals or decency unless it could be brought within some narrower classification of conduct which had previously been held to constitute a misdemeanour at common law.

Emphasis was placed upon the liberty of the citizen, of which "the courts should be the vigilant guardians" rather than the need for the protection of society from the attentions of those who engage in unacceptable or shocking practices. Lord Diplock shared Lord Reid's sentiment in Shaw's case that a conspiracy to corrupt public morals introduced an element of uncertainty as to what conduct would be regarded as criminal. Previously, the question of what constituted an unlawful act could be answered by reference to that which was either specifically prohibited by a criminal statute or fell within a specific category of conduct which had been held to be an offence at common law. The result of Shaw's case is that the individual is made accountable to the widely held prejudices as to what is considered immoral or indecent,

which may lead him to have committed what may ex post facto be held to have been a crime.[181]

Lord Simon's reply is that there are some types of conduct which cannot be regulated by specific statutory enactment, but which must be resolved by juries and other tribunals of fact, for[182]

> They depend finally for their juridical classification not on proof of the existence of some particular fact, but on proof of the attainment of some degree.

In other words, the law can often only state that if a particular level of conduct is attained, a specific legal result will ensue, and the attainment of that standard will depend upon an evaluation in each individual case; numerous examples are cited to elucidate how this is a pervasive feature of the legal system:[183]

> Has an act been done, or a contract performed, or a duty discharged, within a reasonable time? Are goods reasonably fit for a particular purpose? Are they of merchantable quality? ... What is a fair price in a quantum meruit? Has A exercised proper care for the safety of those to whom the law says he owes a duty of care? ... Has B reasonable and probable cause for arresting C, or preferring a prosecution against him? ... Has reasonable notice to quit been given? ... Is the dwelling-house reasonably fit for human habitation? ... Has an employer complied with the manifold requirements of the Factories Acts so far as is reasonably practicable?

Thus the principle in Shaw's case is shown as being far from novel as the method of proof is concerned, although the examples provided would have certainly been more reassuring if they had referred to the criminal sphere with greater emphasis. Further, although it is true that such factors

can only be resolved in court, it cannot be overlooked that what is being assessed is something which has only notionally caused harm to others, so there is no verifiable proof of damage. The task is therefore certainly a more difficult one than that which usually falls for determination.

Similarly the offence of conspiracy to corrupt public morals was defended by Lord Morris who felt that the decision had merely affirmed with certainty that such an offence was known to the law. With regard to the method of proof of the offence, he followed Lord Simon in claiming to be unaware of any procedure by which someone could be told with precision just how far he may go before he may incur some civil or criminal liability.[184]

However, the effect of Shaw and Knuller is to leave a lingering suspicion in the minds of some[185] as to the justifications for upholding a crime which is rationalised at a seemingly abstract level and which may seem to vest arbitrary discretion in prosecuting authorities and ultimately the court. Concerning so-called "judicial law making" one writer[186] cites Lord Cockburn in a dissenting judgment in 1838 when he stated that in the history of law making, when legislative and judicial powers are unsettled and urgent situations require remedy, the courts, of necessity can only act upon their instinctive feelings of morality. When this state of affairs ends, however, such a basis for judicial reasoning is bereft of justification, for[187]

> ... there is a subsequent period in which this primitive state of things is changed. The limits

> of courts and of Parliament become defined - experience has brought out offences - courts have not only decided what shall be held to be criminal, but have established general principles to include new forms of delicts - and the public, in the case of any totally original criminal invention, is adequately protected by the legislature. After this, courts must proceed upon the precedents or the principles which the long, regular, practice of the law has introduced; and they are attempting a task for which they are ill calculated, and were never intended, when they are extracting new offences out of speculations of their own upon mere public expediency.

Thus, it has been argued[188] that now courts can and should only stigmatise conduct as criminal if it is either in contravention of a penal statute, or if it constitutes an established crime at common law, or in the absence of any precise precedent on the point, clearly falls within a determined principle of criminal wrongdoing. In the absence of these criteria, the maxim nulla poena sine lege should apply with full vigour to restrict the operation of the criminal law.

The underlying problem is that a conspiracy to corrupt public morals is in effect a generic offence into which random actions may be bought. Expressed thus, it discloses no specific offence (only its results, namely, a corruption of public morals) and therefore takes on the appearance of ex post facto law making. So by its very nature it is exposed to the plea nulla poena sine lege.

Perhaps, ultimately, the justification of this species of criminal offence rests simply upon the urgency of the problems encountered in the field of public morality

at any given time, and whether the exigency of the moment calls for effective action when the more conventional sectors of substantive law are powerless to act. It is at least arguable that with the proliferation of pornography in the 1970's, the decision in Knuller may be considered as falling within this principle.

Having discussed the Shaw and Knuller cases, they should perhaps be placed in their overall perspective. It seems that particularly if the Shaw case is followed strictly, the courts have fashioned a powerful residual authority. It is submitted that the House of Lords in Shaw v. D.P.P. was primarily attempting to show that a degree of flexibility is needed to deal with novel situations not specifically covered by existing statute or precedent, but which by popular assent are regarded as wrongful and deserving of legal prohibition. Here the law should not be found lacking. In asserting the need for the court's ability to cope with the unexpected, they gave substance to an extremely broad doctrine which is tantamount to proclaiming the courts as moral arbiters with wide ranging powers. In this state, the law, it seems, can only be as certain as the opinion of judge and jury. This must be read subject to two important limitations.

Firstly, as has been stated earlier,[189] the doctrine seems to have been invoked only for publications of an allegedly immoral character, although this is not a limitation imposed by the Shaw principle, but merely by practice.

Secondly, the judgment in Knuller expressly refuted[190] the notion that the courts have a residual authority at common law to create new offences, thereby so undermining the custos morum doctrine as to leave it barely capable of being sustained. It appears that this qualification was intended to establish that the law should be delineated with sufficient particularity to enable a person to determine beforehand the legal status of any proposed conduct. The extent to which the requirement of certainty should be applied depends essentially upon the use to which the law is to be put. It is interesting to briefly review what Professor Mewett has said in this regard.[191]

Mewett's approach is worthy of note because it tackles the problem from a different angle, namely, the use and function of the criminal sanction. The method more commonly adopted is to simply question whether particular conduct is deserving of punishment, whilst assuming, in the event of an affirmative response, that a criminal sanction will be effective, necessary and practicable. Therefore an analysis of legal certainty is shown as entailing additional considerations to those which have been examined thus far.

At a general level he suggests that the proper scope and purpose of the criminal law is[192]

> ... to isolate all the possible elements of a criminal offence and to determine which of them are essential to the criminal law, and which of them are desirable even if not essential, and which are undesirable and irrelevant.

Perhaps this manages to state the basic case, although

at this level it is somewhat simplistic. More specifically, he avers that the function of the criminal law is to regulate that external conduct which experience has shown is inconsistent with the ordered running of society. An interesting qualification is then added, that criminal sanctions should only apply to conduct where firstly, other sanctions - civil or moral - are inadequate, and secondly that the sanction when applied can be of benefit. This leads him to a significant departure from many conventional approaches by claiming that the gravity of the detriment to society does not enter the picture, for if an act causing great harm to the State can be prevented by civil sanction alone, it should not be made a criminal offence; conversely, an act causing slight damage which cannot be prevented by other means is properly a subject for the criminal law.[193] Thus, we are reminded that the consequences of an act should not be regarded as the automatic determinant for resolving whether it should be proscribed; instead the practicability of its restriction by other means becomes the basis upon which to decide whether to invoke the criminal method.

However, this single rationale appears inadequate. Firstly, there are situations, such as prostitution, where there is little hope of effectively preventing conduct by either legal or non legal sanctions. Despite this there may still remain a general social desire that it should be stigmatised as a crime, presumably because it represents an affront to normal moral standards. Secondly, it would

be useful here to differentiate between punishment de facto and punishment de jure. This is clearly illustrated in the case of murder. Punishment in both forms will apply in the case of premeditated killing if there is an absence of any mitigating factors. A crime in this form will usually attract the most vigorous sanctions which in some instances would be the death penalty. Conversely, in a so-called "mercy killing" perhaps carried out by an anxious relative to prevent further distress to a patient suffering from a terminal illness, the actual legal punishment inflicted may be very slight. Nevertheless, in this case, the legal necessity of identifying the act in question as criminal will be reflected at least by the imposition of a nominal penalty. There is here punishment de jure but not de facto in that it cannot be denied that there will be some form of judicial sanction, but it is not applied to a degree commensurate with a normal finding of culpable homicide. Thus although "mercy killings" are not excluded from the criminal category, the role of a legal sanction here is sometimes intended as little more than a recognition that murder, in any form, is basically wrong, and its ability to effectively prohibit that category of conduct does not enter the picture.

Professor Mewett considers further that there are even acts which in themselves may not meet the requirements of harm to society but which should still be treated as crimes simply on the grounds of expediency. He is quick to

observe that this is a dangerous basis for the criminal law, but it is said to be necessary in two limited circumstances:[194] (1) where acts, if not made criminal offences, would facilitate further acts which are crimes, or (2) where the securing of convictions for proper criminal offences would be rendered difficult or impossible. Neither is accompanied by an example and the latter situation cited would certainly have profited from this. Presumably Mewett would include strict liability offences here (where an unlawful offence is committed and perhaps it is evidentially difficult to identify the wrongful party, if any, and the criminal sanction is arbitrarily attached to one person or organisation).

As Mewett's arguments seem to be directed towards the efficacy of criminal law regulation and the general issue of enforcement, how then does the moral perspective enter his considerations? It is his opinion that the criminal law is not based upon moral dictates except in "the most general and unhelpful way", for many offences are said to have little to do with moral right or wrong.

In a later article[195] it is emphasised that the criminal law is concerned with acts only, so that a person's moral status is not the object of criminal sanctions for example, it is not an offence to be a drug addict, a prostitute or a liar. Juridically, therefore, the criminal sanctions imposed against such people are not for what they are, but what they do: an immoral person cannot be equated with a criminal

person, although the two may overlap to a great extent. Thus, it is clear that some acts such as theft and rape are both criminal and immoral. But then some acts are immoral but not criminal, such as lying and drunkenness, and finally, some acts are criminal but not immoral, for example, various highway traffic offences and any crime not requiring mens rea. Accordingly, he concludes that[196]

> ... the connection between the moral law and the criminal law is, or should be entirely fortuitous. If the moral law and the criminal law do coincide, it is not purely because the immoral act has a criminal sanction attached but because some other element is present which renders that act a fit subject for the criminal law.

Mewett suggests that those immoral acts which should be crimes per se are not crimes because they are immoral but because demonstrable harm to society results from the isolated act, as with murder and theft. Conversely, if an isolated act does not prove harmful to society, he sees no justification for declaring it to be criminal; gambling, adultery and prostitution are cited. Yet, he concedes, the presence of wholesale prostitution or gambling may well prove detrimental to society, and it is here that his full statement of policy for the scope of the criminal law emerges, that[197]

> The law must, therefore, be prepared to accept the legality of a harmless (relatively) indulgence, but attempt to prevent socially detrimental excesses and socially detrimental side-products.

This of course is essentially a question of degree, and it is submitted that an attempt at separating a relatively

harmless indulgence from its socially detrimental excesses would prove extremely difficult.

It is evident that in part, Mewett's assertions come close to Mill's doctrine in suggesting that the harm caused to society rather than the immorality of the action, governs its legal status. On the other hand, it must be remembered that the actual determinant of harm, and socially detrimental excesses is itself no more than a moral decision based upon the preponderant community beliefs; accordingly his attempt to shun morality as a working criterion within the legal system ignores the realities of decision making. Furthermore, in practice, it seems that despite Mewett's carefully constructed and plausible argument, the lawmaker will invariably have to resort to simple expedients such as wide legislation (for example, criminal offences which do not distinguish the possession and use of "soft" and "hard" drugs) prohibiting relatively harmless acts together with conduct that is manifestly damaging to the community without differentiating them, except perhaps in leaving the court with a discretion as to the degree of punishment to be inflicted in each individual case. In short, the nuances of his argument are administratively incapable of being applied. The law, of necessity, is required to act definitively one way or the other.

It may be recalled that a parallel was drawn between the enforcement school and the approach adopted by the House of Lords in the Shaw and Knuller cases. The dictum

of Viscount Simonds in the first case draws particularly close to Lord Devlin's position in that both clearly refute the suggestion that the perimeters of the criminal law should be rigidly limited. Devlin asserts that there is no area in which the law may not intercede, whilst Viscount Simonds, in less dramatic vein, suggests that there is an independent residual authority at common law to pronounce judgment upon alleged immorality.

Although some quite telling lines of criticism of this doctrine have been delineated here, it seems that some important countervailing arguments can also be advanced.

Firstly, the notion of "corruption" in relation to public morals is a demanding criterion which would require more than mere offence, upset or affront to public feelings. A forceful argument would, it seems, be needed before the attainment of this degree could be said to have been reached.

Secondly, it equips the legal process to act against those who adopt a grossly immoral course of conduct in a way that was hitherto unforeseen and not specifically covered by existing statutes.

Thirdly, support may be drawn from Mewett's claim that the law should act where other sanctions are ineffective, even if the actual injury to society is minimal. It is not suggested here that a conspiracy to corrupt public morals occasions negligible harm to society, but rather that its actual impact is difficult to calculate. Certainly, where an enterprise is based upon a financial motive (such as the

selling of a magazine) it may well be that even in the face of genuine public distress, only the criminal law will be potent enough to frustrate it.

Fourthly, there are other offences such as obscenity where it is also impossible exhaustively to define the legal status of an act in question until it has been judicially pronounced upon. Whilst this does not in itself vindicate the doctrine under consideration, it at least forces us to recognise that unless the law is to abandon all its responsibilities in the area of morality, we must accept certain of the less favourable aspects as being a justifiable necessity.

In conclusion, it seems that the law can seldom be rid of the plea for greater certainty, particularly in the definition it places upon crime, and it has been seen that a broadly framed criminal enactment or principle will frequently attract quite vehement criticism. But it is submitted that if a demand for clearer definition in certain spheres is met, the problem will simply shift from a conceptual discussion to a technical one; a complete solution cannot be provided by merely expressing the legal enforcement of morality with greater particularity - at this level the argument becomes elaborately pedantic, with the foresight and logic of the Parliamentary draftsman being tested to breaking point. However, it perhaps remains advisable that in this area at least, the guardians of the law, both judges, lawyers, academics and the ordinary citizen, should be

vigilant. The penalties for committing a criminal offence are manifold and far reaching, with repercussions that extend beyond the court of law.

It is submitted that in the last analysis it is preferable that a court should address itself to a questioning of the values and moral standards which the legal process should serve to protect, providing that at the same time it is mindful of the pitfalls of an area that is often reduced to an extremely subjective level. A willingness by the judiciary to test their standards with those of the ordinary citizen, to search for the popularly held beliefs and to utilise the jury as an ultimate corrective to any disparity of opinion between judge and layman, affords reasonable evidence of a legal system cognisant of its own fallibilities and weaknesses and responsive to the needs of the society which it serves. This may well be more desirable than the unedifying spectacle of a judiciary which pursues unduly technical and pedantic reasoning to tortuous and at times absurd lengths, whilst remaining aloof to the general tenor and intent of the provision or rule in question, for it is this perhaps more than the isolated complaint of arbitrariness that is calculated to bring the law into disrepute.

Although the jury system would seem to be beneficial here, the fact cannot be ignored that its use today is not particularly common, especially in Canada. Nevertheless, such writers as Lord Devlin[198] have found the jury a convenient device to illustrate the connection between the law and

social trends because here the opinions of the layman, as being representative of the rest of society, are seen to intrude graphically into the administration of justice. But perhaps too much reliance has been placed upon the jury anyway, for surely the judges themselves are far from impervious to change and current trends. One writer[199] cites the quite dramatic shift in judicial opinion on artificial insemination; in Orford v. Orford[200] in 1921, Orde J. decided in emphatic terms that the practise of AID by a wife constituted adultery. In 1958 however, by which time this technique had become relatively widespread, an allegation of adultery based upon a wife having conceived a child as a result of artificial insemination by a donor whilst separated from her husband, was decisively rejected by the Scottish courts.[201]

Again, a convincing example of the contemporary mores modifying application of the law is afforded in the English case of R. v. Harrison[202] where Lawton J., in placing a mother on 3 years probation for the manslaughter of her child, stated that[203]

> Judges in the past ... have thought that the right way of dealing with women who caused the death of their children by loss of temper was a long term of imprisonment. Judges nowadays appreciate that women living in the sort of circumstances that you were in, and the family problems you were having, do get depressed and in their depression lose their tempers. But we can only be merciful once.

Naturally, by definition law is varied in its application, for it must relate to the most diverse fact-situations, and its interpretation therefore will always remain equivocal -

this has been dramatically illustrated with the offence of conspiracy to corrupt public morals. The current law in its formal aspect is broadly circumscribed by existing statutes and precedent; other factors serve to inhibit its abuse, such as jurisdiction and the doctrine of stare decisis. Also from the observations cited on the position of the judiciary vis a vis changes in community values, it may be suggested further that the method for determining how a principle is to be enforced will depend upon its current social context and the degree to which the judge thinks his decision will be in keeping with contemporary social attitudes.

As a result of the foregoing analysis of the aspect of legal certainty it is now possible to make some suggestions as to the respective weight of both schools under review.

It must be emphasised that this issue of certainty is extremely nebulous and must, for present purposes, be limited to the topics which have been discussed.

The decision in Shaw gave a considerable measure of support for the enforcement of morality theory and particularly resembled Devlin's writings in stressing the need for dealing effectively with social menaces which fall outside the scope of the existing law. The high water mark of this partial endorsement of Devlin is found in the dictum of Viscount Simonds.

At this stage it may be said that the libertarian model is in retreat, being particularly at odds with the principle enunciated in Shaw that there is a residual discretionary

authority in the common law to superintend those offences which are regarded as contra bonos mores. However, it is submitted that this doctrine has been eroded by three important factors.

Firstly, although the decision in Knuller affirmed the offence of conspiracy to corrupt public morals, the House of Lords was strongly inclined to the view that its effect was too far reaching and that it reposed the vestiges of an unacceptable arbitrary power. Therefore it was expressly stated that there was no right at common law to create new offences.

Secondly, in practice this offence has only been invoked against allegedly immoral publications.

Thirdly, both Shaw and Knuller contain powerful dissenting judgments which may afford a future basis for the House of Lords overruling its previous decisions.

In Knuller, the tenor of the judgments disclosed a trend towards recognising the need for both certainty and precision in the criminal law, and whilst the libertarians would condemn the offence in question, it can nevertheless be said that the enforcement school has in some measure lost ground.

The libertarian doctrine received support from Mewett's analysis of the function of the criminal law particularly because he rejects any connection between morality and crime. However, his emphasis upon the effectiveness of punishment as a criterion for conduct being declared unlawful is not entirely compatible with Mill. The difference here is that

if an act caused only slight harm to society but could not be curtailed by other means, Mewett would apply the criminal sanction, whilst Mill would refuse to place it in the other regarding category and accordingly it could not be interfered with.

Finally, in defence of a broadly framed sphere of legal authority it has been suggested[204] that the quest for juridical certainty leads to a desire for making the law narrower and more specific, which is (contrary to the libertarian position) not necessarily desirable. However, although it is preferable to support a wider scheme as advanced by the enforcement school, this is not to say that we should abandon the libertarian objection that on such a model, the law should be zealous to protect only legitimate and necessary social interests.

CHAPTER FIVE

CONCLUSION

In the final chapter it is proposed to sum up the salient areas of difficulty, to outline the major clashes of principle and to end with a concluding statement in support of the enforcement school.

For the purposes of clear presentation this will be divided into two parts. Firstly some perennial problems in the area of law and morality will be considered and secondly the arguments will be placed in perspective.

1. Some perennial problems in the area of law and morality

This section will be considered with some observations of a general application to the debate on law and morality. This will illustrate the problems that are often encountered in this area, especially when particular issues are thrown into focus for the purposes of a specific line of discussion.

(a) Definitional Problems

From the outset it should be recognised that the boundaries of the debate about law and morality are seldom regarded in the same way from one writer to the next. This need not in itself prove a hinderance to an intelligent argument provided that what is understood as the outlines of law and morality for the immediate purposes of the discussion in question be clearly stated. If this is not done it is impossible to assess the significance of the opinions proclaimed because they must be read without a

conceptual context. It is here that the exchanges have become confused in many instances, for when one writer responds to another, his own perhaps different premises as to the scope of law and morality will often lead him to an entirely different conclusion.

It is a common and unfortunate error that dialogues are entered when the central issues of the discussion are not clearly defined. This failure of the disputants to clarify their positions and to identify the point of contact often seems to leave them shadow boxing on different planes.

Thus, in the Hart-Devlin controversy, it has been observed that[205]

> Lord Devlin and Professor Hart, and a few of their followers, do not even speak the same language ....

And that comparing them[206]

> ... is tantamount to opposing two different systems; their approach to morality, their purpose and even their vocabulary are different.

Whilst it is difficult to embody the source of their difference within a single formula, it may perhaps be said to rest upon the simple fact that Devlin is generally concerned with the welfare of society as a whole, whereas Hart is involved with the interest of the individual. Inevitably the desire to promote the one will lead to a compromise of the other. Both will regard certain values as vital. The interest of society demands that individual divergencies in taste and conduct should not assume such proportions as to affect the welfare of others. From the individual's standpoint, close

attention is drawn to the actions of government and the judiciary in a vigilant watch for unjustifiable incursions into the private sector. It cannot therefore be said that they differ in approach to the same problem, for the problem itself is conceived from entirely distinct directions. In fact similar definitional problems are encountered with a number of other writers in this field.[207]

(b) The difficulties of ascertaining a collective opinion

A feature common to both theses is that, of necessity, they must act upon the collective opinions of society. The libertarian requires this judgment in order to determine which aspects of conduct are sufficiently harmful to be included within the other regarding sphere. Similarly, an enforcement of morality proceeds from the basis of a social consensus; without this the concept of a shared and binding morality is quite nugatory.

Therefore, one of the main problems encountered by both sides in this debate is that it becomes extremely difficult to rationalise objectively such a subjective area, for it seems that bias and prejudice are as much a part of our social values as religion or social order.[208] Thus, the "reasonable man" to whom so much attention has been paid will often entertain quite subjective and at times irrational prejudices. When it is remembered that this hypothetical figure is tendered as personifying the bulk of public opinion, it will be seen that the social needs and demands which he notionally reflects will often vary dramatically from one writer to

another. One cannot therefore hope for clearly identifiable social mores to emerge from the myriad or public attitudes, some of which are confessedly grounded in popular prejudice. Furthermore[209]

> ... since both law and morality vary with the nature and structure of each society, absolute or definitive rules in this field can only belong to Utopia.

If we focus upon one aspect, religion for example, the difficulty of attaining a collective judgment becomes immediately apparent. For Dr. St. John-Stevas the abiding problem is that[210]

> Modern society is essentially pluralist in its religious construction with men of different religious faiths owing a common allegiance to the State. In such a situation law cannot be co-extensive with morals since from different religious premises different moral judgments will flow.

On the other hand, this point should not be overstated, for it is undoubtedly correct to say that law can at least be co-extensive with morals insofar as it reflects the basic attitudes as to right and wrong, such as respect for life and property, which are necessary to prevent social anarchy. Also, Dr. St. John-Stevas later implicitly admits that these two elements have not come too far adrift, for the majority's fidelity to the law is said to be as much because it is felt to be morally binding as it is due to the knowledge that its breach will lead to punishment. This observation is certainly valid for those who assume a cohesion of social attitudes and the presence of a core of "moral solidarity" along the lines of Devlin. Further, in a response which is somewhat

similar to Devlin's approach, he adds that the State knows nothing of sin qua sin, although it may well involve itself with conduct that is contrary to the moral standards accepted by the community, which as an incidental element may be sinful. Accordingly the proper ambit of legislation is regarded as the proscription of those moral offences which affect the common good. Interestingly his conception of the common good emerges as a combination of Devlin's notion of a "community of ideas" and Hart's "universal values";[211]

> It is clearly necessary to define what is meant by the common good. Public order and civil peace: the security of the young, the weak and the inexperienced, the maintenance of the decencies of public behaviour, all are included within the concept of the common good. These ideas do not exhaust it. Every community holds certain moral ideas and ideals of behaviour in common, and this moral consensus also forms part of the common good.

The collective opinions of society may be further identified by another method centering upon the expectations which law evokes. In this type of discussion there is a strong tendency to rationalise law in the purely objective sense of being a series of mandatory rules, regulations and prohibitions. It must not be forgotten that law has an important psychological aspect, and whilst this is too wide a topic to be dealt with here, it should at least be borne in mind that the concept of law and the legal order hold a position of eminence in the values of society,[212] and it is no doubt true that in almost every culture the law is surrounded by an exceptional prestige.[213] Its status rests

partly upon the fact that the citizen expects something from it, such as protection, justice, order, truth and principles of social behaviour, in other words, values which he can relate to himself and in which he can have confidence. This imposes upon a legal order certain burdens such as its answerability to what has been termed the "social conscience", which in the criminal field "must be satisfied that particular acts should be punished, for no law can violate the ideas of justice and fairness of a substantial part of the community and be effective for very long." [214]

It is submitted therefore, that whereas law may be said to "govern" society in the sense of laying down a certain set of obligations in imperative form, its ultimate justification rests not upon an assumed internal objective veracity but upon the acceptance by the community that it embodies standards which are recognisably beneficial, and it is because of this accountability that the law may be said to serve as well as govern society. Thus it has been suggested[215] that the jurist should be alive to the simple truth that the efficacy of the law depends on the adherence which a man gives it because of the satisfaction he experiences in it.

However, the situation goes deeper than this for we are dealing with the dual systems of law and morality, the former being considerably more exact than the latter. Even where the law is not precise in its form, it usually at least remains possible to identify the basic postulates upon which a legal rule operates. In contrast, when evaluating the moral

beliefs of the community, it is often difficult to locate even a core of settled belief let alone public attitudes upon debatable issues. It would therefore obviously be idealistic to visualise a complete fusion between law and morality, and the only satisfactory point of integration may perhaps be seen with offences which are generally said to fall within the category of being mala in se, such as murder.

The diversity and subjectivity inherent to social morality indicates that it is only with respect to basic obligations and duties that anything approaching common agreement can be reached. It is for this reason that the argument is so vigorous and yet at times disjointed, as it broadens into the wider issues of debate.

(c) Ought law to lead or to follow?

This gives rise to one of the more compelling questions as to the stance that law should take in a free society.[216] Clearly, if law is to fulfil either a dynamic role at the forefront of community attitudes, or alternatively a restraining influence, by preserving a particular morality against change, this will lend considerable support to the enforcement school which asserts the primacy of law in both these situations. If however the judicial and legislative processes are found to be unduly subservient to public opinions then the law will not possess the independent status which is necessary for an enforcement of morality theory. Therefore it must be asked whether there is a general belief

that the law should be at the vanguard of modern attitudes and opinions, whether it should lag behind at a respectful distance, or whether it should be designed to arrest the moral status quo at a given time in a society's history?

Little support can be found for the last proposition; it would seem little short of tyrannical for a judicial system to impose a standard which had ceased to claim any vestige of respect from the majority of the population. With regard to the first, it may be remembered that Stephen cites coercion as being an agent of social change and reform, although he is apparently visualising the bulk of society being compelled to do things which are for their own benefit, the judgment as to what constitutes the common good being drawn from the results of past experiences which would generally be recognised as being right. Coercion then, for Stephen, merely prompts people to do what they would themselves probably admit to be in their own best interests. It should therefore be clarified that on Stephen's theory, although the law may be the instrument which facilitates change, it does not necessarily determine what the content of the change should be.

Most of the writers mentioned would probably find themselves in agreement with the second proposition, that law should not be affected by every shifting impulse and that a case should be carefully laid out showing a stable, constant support for proposed change before the law should

countenance it. This type of approach has been endorsed on the grounds that it is not the function of the law either to promote or to prevent change but merely to keep the community civilly organised as it moves along. Here the status of law is approached not in the context of its opposition to change but in the context of whether it falls unreasonably behind the social and political consensus. What is termed the "powerful urges of conformity" within society (by which is meant the tendency to align ones own behaviour with others) are said to be the important factor.[217] The law must await the formation of a degree of conformity in a broad sector of the community, and it will prove successful according to its consistency with the customs and moral sense of the community - if it is substantially contrary to these mores it cannot be effective. However, as Devlin has observed,[218] in many instances of law reform a powerful vocal minority may achieve change through a tour de force against widespread but often unarticulated dissent. Here it may be questioned whether the abolition of capital punishment in Britain and Canada in fact reflected public sentiments on the matter at that time.

It is suggested that the liberal school would wish to ascribe to the legal system an essentially negative role, as envisaged for example by one writer when he claimed that[219]

> In a free society, the law is not a causative agent; it does not prescribe man's progress any more than it does any other aspect of his conduct. It is a reflection of his social activity, not a determinant of it. The law responds to man's aspirations; it does not

> create or inspire them. In a sense, the law begins with conclusions. If the conclusion has not been drawn, no law is possible and none is necessary.

On the other hand such jurists as Stephen would not be entirely satisfied with this position, for he is not at all convinced that the conclusions which society generally draws are the best for its own welfare. Thus a coercive model cannot apply here, for if society is in widespread agreement as to a particular moral principle and largely complies with it, there is no need for compulsion of the majority for their moral improvement. Of course, in relation to the coercion of dissentient minorities, the presence of forceful and discernible social beliefs provides greater impetus for mandatory controls against the non conforming sections.

It is submitted that a single rationale is unattainable on this issue; sometimes law moves dynamically forward, perhaps standing in the forefront of public opinion at a time when popular attitudes and responses remain equivocal. In other areas it is more guarded and refuses to be immediately swayed by the transient emotions of public opinion. This kind of conservatism is desirable at least in controversial areas of public debate, for laws that changed in response to every shift in public opinion would soon fall into disrepute; as Devlin remarks[220]

> The legislator must gauge the intensity with which a popular moral conviction is held ... The restraint upon him is that if he moves too far from the common sense of his society, he will forfeit the popular goodwill and risk seeing his work undone by his successor.

This would have greater force if one were to regard the "common sense" referred to as being a core of settled opinion which, although often unspoken, forms society's basic assumptions as to right and wrong. It should be noted that sometimes a demand for the repeal of an existing enactment or rule of law may in reality be little more than academic. In practice it may well be that some crimes have fallen into desuetude through non enforcement, for at this level the law is able to respond to existing standards long before Parliament and the courts come to officially lay an unacceptable rule to rest.

It is suggested that in the last analysis the reason for the law's differing standpoint from one field to another is the result of the common law heritage - the law has evolved, and continues to develop, not logically but empirically. For this reason it is difficult to discern any coordinated policy by which to assess the relative influence of the theories under discussion.

It seems to be a common ground that the law should not appear capricious by acting upon sudden promptings of public sentiment. On the other hand, both Stephen and Devlin go considerably further than this by emphasising the value of past experience as providing a source of those time proven standards and values worthy of preservation. The libertarians would undoubtedly stigmatise this as being oppressive and needlessly intransigent. Perhaps it may be tentatively suggested that in the criminal sphere a general conservatism

prevails, as evidenced by the reluctance to legalise such areas as drug abuse and certain sexual misdemeanours.[221] In this regard the enforcement school may certainly be said to hold some measure of influence on present legal thought.

(d) Internal value conflicts

Another point that should be drawn out whilst the critique is being conducted at this general level, is that throughout their writings Mill, Stephen, Devlin, Hart and others discuss such notions as freedom, liberty, tolerance, common morality, coercion, the enforcement of moral principles and the like. What tends to be ignored is that mankind values a variety of things which are not always mutually reconcilable.[222] Liberty and equality remain compatible elements only insofar as equality is restricted to equality of opportunity, for if it is also taken to mean equality in one's station in life then a conflict with liberty emerges. This is because men differ in their natural endowment and a hierarchy quickly becomes apparent, hence equality can only be established and maintained by interference, which prevents the stronger from profiting from their natural advantages. A similar conflict besetting the criminal law is shown here:[223]

> Every citizen is a potential victim of crime and every citizen is a potential suspect of a crime he has not committed. The interest of the citizen qua potential victim requires that crime detection be made as effective as possible; his interest qua potential suspect requires that the utmost safeguards be taken against the entrapment of the innocent.

> Either of these interests can be safeguarded only at a price in terms of the other.

This perspective is useful in that it shows the conceptual ambivalence of the epithets which several leading jurists apply in an almost unqualified sense, as if they were dealing with immutable and quite definitive notions. However, at the same time it must be remembered that they at least generally recognise that whatever theory they may be advancing has been arrived at by a process of balancing conflicting interests and when certain levels have been effectively reached (for example, the limits of tolerance, or the limits of useful interference), their own particular argument should then come into play.

(e) A narrowing of points of conflict

Much has been said about the areas of difference in this debate, which may tend to obscure the fact that there also exist common grounds of agreement in even the most extreme views. Thus Mill, Stephen and Devlin alike would undoubtedly agree that any civilised society should be called upon to permit unacceptable behaviour at least to the point where the limits of toleration are reached - the disagreement of course comes in the placing of a definition upon those limits.

It is often assumed that the two main schools of thought in this field have each adopted a stance which is poles apart and that they are in no way reconcilable. Such a view emerges from those who have gained the impression that there must be

either a vigorous enforcement of morality or a total relaxation to permit full rein to individual expression. However, this is to ignore the fact that several of the main doctrines are really no more than qualified suggestions. The qualifications tend to be overlooked whilst the broad statements of principle without more have received undue emphasis. It may be recalled, for example, that Mill's plea for liberty is much narrower than may appear at first sight; it is expressly limited to conduct which does not cause harm to any other class of persons. Further, the liberty of personal discretion is far from absolute - although each person should be the final judge of how his life should be conducted, others have a concern in his well-being and are encouraged to promote the good of their fellows through "disinterested exertion". Other qualifications which do much to mitigate the severity of the libertarian ethic have been mentioned earlier.[224]

Similarly, Stephen, after establishing the value of a coercive system, diminishes its effect by attesting to the necessary limits of compulsion and of the powers of the legislator. He even makes the surprising assertion that the proper ambit of the legislator's function will seldom include mere vices. In this he seems to have manoeuvred himself into an ambiguous position having regard to his more dominant theme that law should be used to act strenuously against unpopular conduct thereby giving expression to the anger excited in the healthy mind. Yet it appears that mere vices

which are regarded as wicked will draw the community's desire for vengeance, and here Stephen's limitations on personal interference will buckle under the clamour for their legal persecution.

Again, one may endorse the view that Devlin and Hart[225]

> At the outcome ... do not stand very far apart, since both Hart's 'harm to others' principle and Devlin's protection of society's moral structure rest on a very similar necessity, that is, a system of values particular to each society concerned.

This has already been dealt with earlier[226] but for the sake of completeness an example may be rendered. Hart's paternalism may be cited here because it leads him close to Devlin's position on the right to legislate against immorality. Indeed, even in the case of Devlin's and Mill's theories, it is possible to foresee similar policies emerging from the two doctrines. Mill would disapprove of persons debilitating themselves by imbibing to excess and he would attempt to discourage this without going to the length of proclaiming it unlawful per se.[227] Devlin, on being satisfied that society was thereby harmed through a diminution of the contribution of its members as worthwhile and effective citizens, would intervene accordingly with prohibitory measures. It is essential therefore to appreciate that despite the widely differing starting points of each school, in the final result the difference between them is not as major as might first appear.

2. The Arguments in Perspective

Having considered these general comments on the debate, the arguments must now be placed in perspective to see whether any specific conclusions can be drawn.

(a) The libertarian case

The libertarian case is usually assumed to proceed from the principle that any restriction upon freedom prima facie requires justification; as it was typically expressed:[228]

> ... the advocate of restriction must not only show that some harm is prevented by the restriction, but that the harm prevented is so considerable as to outweigh clearly the standing presumption against restriction. If the evidence is less than clear, respect for freedom would lead us to err on the side of freedom rather than restriction.

However, such views seem to follow from the undiscussed premise that freedom is by its nature calculated towards desirable ends. Against this it may be said that that which a person does freely is not ipso facto morally good, for man may be freely unjust or bad.[229] It is also true that an action which is not freely performed has no moral character at all, particularly if one is acting purely under compulsion. Nevertheless this should not be taken too far for one may still be a free agent in the sense that social pressures may dictate a certain line of conduct whilst leaving open the option to take an alternative, but unpopular course.

Mill envisages freedom as a monolithic structure which is sustained by the vigour of individual expression, the example of social experimentation, and critical and mutually instructive dialogue between various sectors of opinion.

Yet it is admitted that these qualities which underpin his whole libertarian theory are more visionary than real and that more often than not individuality and experimentation are dissuaded by fear of popular censure and that the majority opinion, far from soliciting disinterested criticism, is apt to revile, denigrate and ultimately condemn such dissenting views as being immoral or improper. Also, the essence of his complaint against the coercive system is that one moral viewpoint may be thrust upon the minority elements by an intolerant majority. However it seems that irrespective of its actual necessity, the libertarians are themselves imposing their particular moral value (freedom) on the rest of society, because they consider freedom to be good for them. This itself may be classified as an enforcement of libertarian morality, which is a surprising and somewhat dubious volte-face.

There are also damaging internal inconsistencies which tear at the very fabric of his argument, these have previously been discussed in detail[230] and are mentioned here in summary form.

A significant irregularity is introduced by his suggestion that those who deviate from conventional standards should be urged, through disinterested exertion, to desist. This is particularly ill advised because firstly, as Mill has himself averred, such exertion is seldom "disinterested", nor does it respect the individual's discretion as being the final deciding factor in such matters. Secondly, those who are subjected to such pressures are likely to be the very

individualists upon whom so much reliance is placed. Indeed, it must be questioned critically whether each person is really a potential "centre for improvement"; the potential may be possible enough, but the chances of its realisation are extremely slender in most stable societies which have long since settled into rigid and established patterns of convention.

Moreover, as was shown earlier[231] in certain areas Mill wavers and the thrust of his libertarian case falters. This is drawn out clearly in his treatment of the commercialisation of vice,[232] where he simply fails to provide the tools with which to fashion any viable system of government due to his ambivalence. Again, it may be recalled that Mill believed that if infallibility were possible suppression would still be unjustified. In contrast, even if on the most unfavourable construction, under Stephen's or Devlin's hypotheses licence was afforded to blind prejudice to express itself in criminal persecution, at least a clear situation would emerge and provide some basis on which to act and eventually engraft an improved system. In short, Mill's hesitation based upon his constant moral doubt places him in a quandary from which he cannot be extricated.

It is however part of the anomaly of Mill's theory that in other passages he is able to assume a sufficient cohesion of ethically valid responses to justify decisive action, for example, by claiming that society has a right to ward off attacks upon its members and that the State may indirectly

through taxation discourage acts which are deemed harmful to the agent, such as intoxication, even if it places alcohol beyond the economic reach of those of average means. The latter instance raises an important issue, for it is tantamount to an admission of paternalism, which is totally inconsistent with his central principle that in the self regarding sphere the individual's judgment should be absolute. Furthermore, the doctrine of paternalism is again brought into play by his exception of the young and vulnerable requiring protection. Whilst in this case it may seem reasonable to exclude such parties from the full rigours of a completely open principled society, it cannot be denied that paternalism has gained a strong foothold and that it is completely at odds with the primary theme of libertarianism. It has been suggested earlier[233] that some element of morality is immanent to any form of social decision making in that any decision necessarily proceeds from a value judgment; the difference between Mill's theory and that of Stephen or Devlin is only a question of degree. The inclusion of a form of paternalism pulls Mill uncomfortably close to an enforcement of morality thesis, and whilst there is far from a conceptual parity here, Mill has exposed himself to the criticism that the only effective difference for practical purposes between himself and his adversaries is that of factually identifying which areas of conduct are to be governed by legal sanctions and which are not.

Hart's thesis and its weaknesses have already been

discussed in extenso in Chapter 2. Suffice it to say that the most cogent line of criticism is based upon his concession of paternalism which received detailed consideration earlier. Interestingly, Hart has been vigorously attacked on this issue, whereas it has been argued here that paternalism, far from being novel to the libertarian cause, is in fact present in that which is often regarded as its very source, namely Mill's "On Liberty". Therefore, although Hart's thesis is expressed as being an endorsement of Mill on the "narrower issue relevant to the enforcement of morality" [234] he is in effect upholding Mill's theory in a wider sense than he had perhaps recognised. It has been asserted previously[235] that paternalism is so irreconcilable with the libertarian standpoint that the enforcement of morality is thereby conceded.

(b) The Enforcement of Morality

The relative strengths and weaknesses of the enforcement of morality school may now be analysed. Stephen will be considered first.

In Stephen's support it may be said that there is more than a grain of truth in the apparent paradox that coercion is needed to permit any form of liberty. This suggestion requires modification in that it cannot be denied that in literal terms, restraint is the antithesis of freedom. However, "it is evident that man tends towards inequality and therefore a coercive system may at least hold the balance between fair and unfair debate and prevent persecution and

unwarranted interference with those who maintain and practise unpopular beliefs. This would naturally meet with Mill's approval; it may be said that even on the libertarian scheme, the more extreme aspects of such interference would be prevented insofar as they fell within the other regarding category. Mill would warn that coercive systems are likely to support rather than to alleviate an unequal situation, for usually their thrust bears down in favour of one particular element or cause. In truth compulsion is often used to advance a single viewpoint or ideology, for enlightened despots are few and far between.

Although Stephen comments quite plausibly that originality is likely to diminish in the face of equality, it is unlikely that the spirited individualist would fare any better under a coercive system.

Stephen recognised that law at times expresses social antipathy to certain conduct and is, as it were, an official substitute for private and public vengeance. This is realistic in that law must to a large extent reflect public sentiments on important areas of morality. Nevertheless, as the libertarians would caution, such an approach is capable of being exploited in two particularly dangerous ways. Firstly, if popular anger and the desire for vengeance are to indicate the point of legal intervention, the safeguards upon individual liberty may well be reduced by steady attrition until the law simply serves to enforce every widespread feeling of intolerance. Secondly, with emphasis being placed

upon the rightful scope of the law rather than its necessary limitations, there is a possibility that whilst eyes are being averted from the perils that attend any unquestioned extension of the legal and legislative functions, the enforcement of morality will become the pretext for tyranny.

At this juncture, Devlin's thesis may be inserted into the discussion for he takes a similar approach in that his formula of "the maximum individual freedom that is consistent with the integrity of society" [236] is marked off by disgust and repugnance, which, as has been maintained earlier[237] are potentially bad criteria. His warning that such responses should be genuine and not feigned saves him only if it is possible to separate genuine disgust from genuine prejudice. It is submitted that neither in theoretical nor in practical terms can such a distinction be upheld, for disgust is no more than the representation of a particular predisposition or bias. Also, the implications of using such emotions for these purposes should be pursued to their logical conclusion as a test of their validity. Devlin, it may be remembered, is concerned to protect or preserve society in its fundamental form, which is enshrined under the panoply of a shared morality. Therefore, if popular disgust and outrage are invoked to decide where and when conduct should become referable to legal sanctions, it is necessary to make the equation that such disgust and outrage warn of imminent harm to society through an attack upon its values. In other words we must

be talking not of disgust *per se*, but of a strongly unfavourable response that relates to a positive social harm. To this it might be said that Devlin does not warrant that *every* successful attack upon a shared morality will inevitably destroy that society but only that if any part of it is relinquished, it may prove at least to be potentially injurious. This exposes him to the response that the criterion of public intolerance may operate to suppress and persecute activities which are not in fact harmful to that community's existence and that what is occurring is popular intolerance without more. In Devlin's defence it can at least be said that the shared beliefs were themselves constituted through some rough kind of social consensus based not only upon what is considered right and wrong but also upon the strength of belief with which such views are held, irrespective of whether, objectively, they appear to be morally sound. Whilst this does little to expiate such possible injustices as the oppression of minorities, as a crude principle of *realpolitik*, it would seem to lend a greater degree of security to the social majority.

Attention may be turned briefly to Devlin's paramount concept of a shared morality, for it receives a surprising measure of support from Hart's so-called "universal values".[238] Indeed, this basic notion is common to all the main writings under discussion. Thus Mill, by virtue of his admission that the course of freedom ends where perceptible harm is occasioned to individuals or an assignable class of persons,

assumes that such interests deserve complete protection. Again, Stephen's coercive model rests upon the existence of values which the majority would readily recognise as being desirable and which are being enforced in compliance with their own better judgment.

Here, at least, there is a common term of reference; under the enforcement doctrine, the shared moral values are expanded to dominate the whole theory, whilst for the libertarian school, they are only a preserve, the boundaries of which set out the furthest limits of permissible freedom.

If one adopts the notion that society is composed of a "community of values" then the concern of the State in the well-being of society may indeed justify incursions into the interests that are neither definitively public or private. The traditional response from the libertarian perspective is that the purely private spheres should be left to the discretion of the individual and that where the situation is at all equivocal, the onus is upon the State to show cause as to why it should intervene. To this extent, statements in the Ouimet and Wolfenden Commissions[239] would seem to indicate that the law is at this moment in partial retreat. However, whilst they illustrate a broad direction of principle, their evidential value should not be unduly exaggerated for it would require far greater investigation to evaluate accurately the influence of these theories and the extent to which they are reflected in social policy making. It cannot therefore be said that the libertarian ethic has emerged so triumphantly

as to banish the law from most of the important fields of morality, although there are at least grounds for suggesting that in some areas it has been in the ascendant in terms of its cautionary warnings. It seems that particularly with regard to legislation, intervention must, as a minimum condition, be shown as being necessary after weighing the interests at stake before legal pressures can be exacted to reinforce a questionable moral premise.

Perhaps, especially in modern times the ultimate determinant of wrongful conduct is whether physical injury or damage calculable in material terms has arisen. Anything less than this requires strict proof. It was indicative of this trend that the House of Lords in Knuller v. D.P.P.[240] expressly limited the custos morum doctrine enunciated in Shaw v. D.P.P.,[241] the vestiges of an arbitrary and paternalistic residual authority in the courts being perhaps too unspecific to satisfy the exact level of definition required by contemporary moral standards.

Conclusion

Having evaluated the two main theories, some concluding remarks may be drawn to consolidate the final statements of principle.

This debate is by its nature inconclusive because, as has been illustrated, neither argument can be sustained fully without attracting damaging criticism. However, it is submitted that on balance the enforcement school is to be preferred. The advantages of this system have already been

discussed together with its weaknesses. Therefore its principal merits over the libertarian alternative may be briefly stated.

Firstly, previous argument[242] has shown that morality is an all-pervasive feature in the judicial, governmental and administrative functions and therefore any theory relating to society should reflect this. Accordingly it is clear that the enforcement school more closely corresponds to social realities, which the libertarians obscure by their insistence upon a strictly limited operation of morality.

Secondly, the libertarian system is unresponsive to the problems posed by those self regarding practices which are nevertheless generally considered to be pernicious, for example, heroin addiction. On Hart's theory this may either be permissible as being a self regarding act, or alternatively be prohibited pursuant to his notion of paternalism. These obvious deficiencies have already been exposed.[243] Again, Mill's belief that dissidents may be reformed by good works and general example is for the large part illusory, whilst the enforcement school at least offers a practical solution by acting to reinforce the community's attitudes when genuine apprehension and alarm are felt.

Thirdly, although the criteria of intolerance and disgust may seem quite repugnant to the libertarian ethic, the coercive theory can at least claim the merit of having adopted a system which provides a realistic basis for law and government, which are both undeniably swayed by strong

public sentiments.

Fourthly, in practical terms, one of the most dubious aspects of the libertarian theory is that it is predicated upon the optimistic belief that mankind generally, and also those non conforming individuals who set a spirited example to the rest of society, will in the main tend toward good rather than evil. This is highly questionable and in reality Mill's model of freedom would merely permit the strongest elements to prevail over the weak for self seeking motives rather than altruistic ones. In other words, on balance freedom furnishes the latitude to be oppressive rather than benevolent.

Interestingly Stephen's model is open to the same criticism although from an entirely different perspective, namely, that it presupposes that those in whom the coercive powers are to be vested will use them to the general good and thus Mill's warning that those who act pragmatically may do so wrongly, holds true here. However, injustices are at least more readily identifiable under a coercive system because they often arise as an official ordinance of government or judicial policy. Under the libertarian scheme, if government interference was exclusively limited to other regarding conduct, then the worst injustices against individuals would appear in the more insidious and less recognisable form of unfair or oppressive social practices.

Devlin's approach is more practical for it is based not upon a search for some hypothetical social standard, but upon

society retaining its identifiable characteristics which must be upheld if the community is to proceed as a workable unit, for example, a common acceptance of mutual rights and duties, a recognition and enforcement of deeply felt principles and freedom from the overtly harmful. In this he is undoubtedly correct, for any collective enterprise can only exist within a spirit of mutual cooperation. Certain fundamental elements such as those cited in Hart's "universal values" [244] which are regarded as being important must be adhered to; if they are not, individual interests would be left to assert themselves unchecked thereby destroying the very basis upon which orderly co-existence is founded.

Fifthly, the libertarian position is so vitiated by internal inconsistencies that it is unable to survive as a pure theory. It is evident that Mill's doctrine shares an element of Hart's paternalism, which injects a large measure of morality into both theses. Therefore, the views of Devlin and Stephen are decidedly more favourable because they openly take account of morality and its manifold operations and incorporate it as a basic aspect of their theories. In contrast, the libertarians have sought a test to exclude interference with private morality, and failed.

In the last analysis therefore, the greatest single justification of the enforcement school is that it better survives the crucible of social reality by recognising and acting upon existing human conditions. For this reason alone, absolute rules within a coercive system are infinitely

more meaningful than absolute values contained within a libertarian model.

Whilst the enforcement of morality theory is more convincing in purpose and direction, it is at least arguable that as a consequence it lacks flexibility and the ability to adapt to rapid changes in political and social emphasis. In places Devlin in particular seems to present the alternative of either an arrest of the social status quo or a mutation so radical as to amount to a social metamorphosis, or even the complete destruction of society. Nevertheless, both Stephen and Devlin recognise the necessary limitations placed upon legal interference. They both concede that the State should not use the criminal law haphazardly. Only in the last resort should an act be designated as a crime. Indicative of this is Stephen's assertion that the criminal law is the ratio ultima of society against those who attack its fundamental values.

The justifications for imposing a coercive system upon a free society have already been examined and compared with the libertarian alternative. In closing it is necessary to render the enforcement theory secure from one of the primary libertarian objections, that any scheme based upon an enforcement of morality is exposed to the likelihood of serious abuse and misapplication.

Perhaps in advancing the views of Devlin and Stephen and their followers in preference to the libertarian approach, we should finally rest our faith on the good sense of the common

man, that he will reasonably anticipate and expect good government based upon what he and the majority of his fellows regard as reasonable and sound. Admittedly tyrants ascend to political eminence, whether by democratic means or force, but ultimately they are accountable to the corporate sense of propriety residing in the community, for the average citizen will at best give only qualified support to that which meets his disapproval. He must at least perceive some beneficial quality in the overall scheme of government. This is crucial. The average person needs and expects to be guided in his relations with others, if necessary in mandatory form, to ensure that fairness, equity and social balance are preserved and that the fulcrum upon which these values hinge should never be upset without a justification in which he can feel some measure of satisfaction. It is therefore axiomatic that any form of government cannot for long be secure if it strays from the established rules of decency and reasonableness upon which civilisation ultimately rests. Herein lies the fundamental safeguard of the coercive theory. Whilst this may not meet every libertarian objection, it is submitted that it is assurance enough to protect the coercive system from abuse. Thus, in an area where compromise and expediency must necessarily modify absolute principles, it would not be amiss to conclude with Lord Devlin's appraisal that[245]

> If we are not entitled to call our society 'free' unless we pursue freedom to an extremity that would make society intolerable for most of us, then let us stop short of the extreme and be content with some other name. The result may not be freedom unalloyed, but there are alloys which strengthen without corrupting.

1 Report of the Canadian Committee on Corrections. Towards Unity: criminal justice and corrections (1969).

2 Id. 1.

3 Home Office and Scottish Home Department Report of the Committee on Homosexual Offences and Prostitution Cmnd. 247 (1957).

4 Id. para 1.

5 Mill, On Liberty (ed. Cowling 1968).

6 Hart, Law, Liberty and Morality

7 Stephen, Liberty, Equality, Fraternity (ed. White 1967).

8 Devlin, The Enforcement of Morals

9 Id. See generally chapter 1 "Morals and the Criminal Law".

10 Shaw v. D.P.P. [1962] A.C. 220.

11 Knuller (Publishing, Printing and Promotions) Ltd. v. D.P.P. [1972] 2 All. E.R. 898.

12 Stephen, Supra, n.7 at 88.

13 See Benyon v. Nettlefold (1850) 3 Mac & G 94. and Blachford v. Preston (1799) 8 Term Rep. 89.

14 Supra, n.1.

15 Supra, n.3.

16 Supra, n.1 at 12.

17 Id.

18 Brown, Drugs and the problem of law abuse (1972) 7 U.B.C. L. Rev. 1 at 2.

19 The case of Klippert v. The Queen (1967) S.C.R. 822 exemplifies both principles in that the Defendant, who admitted committing a series of purely consensual homosexual offences over a period of years, was given a sentence of indefinite (preventive) detention on the basis that he was a dangerous sexual offender.

20 The Criminal in Canadian Society: A Perspective in Corrections (1973).

21 Supra, n.3 at para 61.

22 Id.

23 Id. at para 13.

24 Supra, 1.

25 Supra, n.3 at para 13.

26 Id. para 61.

27 Mill, Supra, n.5 at 121.

28 Id. 135.

29 Infra, 32 ff.

30 Mill, Supra, n.5 at 143.

31 Id. 150.

32 Id. 136.

33 Id. 166.

34 Id. 160.

35 Id. 129.

36 Supra, 16.

37 Samek, The Enforcement of Morals, A basic re-examination in its historical setting (1971) 49 Can. Bar Rev. 188 at 195.

38 Devlin, Supra, n.8 at 128.

39 Mill, Supra, n.5 at 212.

40 See Supra, 26.

41 Mill, Supra, n.5 at 129.

42 Id. 219.

43 Id. 214.

44 Id. 212.

45 Infra, 33.

46 Supra, 26.

47 Mill, Supra, n.5 at 196.

48 Samek (1971) 49 Can. Bar Rev. 188 at 199.

49 Mill, Supra, n.5 at 190.

50 For example, indirect State prohibition of liquor through taxation. See 48 infra.

51 Mill, Supra, n.5 at 172-173.

52 Id. 177.

53 Devlin, Supra, n.8 at 123.

54 Mitchell, Law, Morality, and Religion in a Secular Society

55 Mill, Supra, n.5 at 136.

56 Id. 137-138.

57 Devlin, Supra, n.8 at 108.

58 Id.

59 Mitchell, Supra, n.54 at 97.

60 Mill, Supra, n.5 at 213.

61 Id.

62 Devlin, Supra, n.8 at 108-109.

63 Samek (1971) 49 Can. Bar Rev. 188 at 198.
64 Supra, n.6.
65 Id. 5.
66 Id. 20.
67 Mitchell, Supra, n.54 at 70.
68 Hart, Supra, n.6 at 34.
69 Devlin, Supra, n.8 at 133.
70 Supra, n.54 at 76.
71 Devlin, Supra, n.8 at 134.
72 Id. 135-136.
73 Id. 135.
74 Hart, Supra, n.6 at 33.
75 Mitchell, Supra, n.54 at 70-71.
76 Devlin, Supra, n.8 at 136.
77 Id. 137.
78 Hart, Supra, n.6 at 57.
79 Id. 58.
80 Id. 57.
81 Id.
82 Id. at 60.
83 Id. at 66-68.
84 Merrills, Law, Morals and the Psychological Nexus (1969) 19 U.T.L.J. 46.
85 Id. 53-54.
86 Punzo, Morality and the law: the search for privacy in the community (1973) 18 St. Louis University L.J. 175 at 176.
87 Supra, n.7.
88 Id. 64-65.
89 Id. 61.
90 Id. 66.
91 See generally Mill, Supra, n.5 Chapter 1.
92 Stephen, Supra, n.7 at 58.
93 Id. 59.
94 Id. 76.
95 Id.
96 Id. 78.

97 Id. 79.

98 Id. 81.

99 Id. 80.

100 Id. 85.

101 Id. 151.

102 Id. 150.

103 See Infra, 108-109.

104 Stephen, Supra, n.7 at 159-160.

105 Samek, (1971) 49 Can. Bar Rev. 188 at 206.

106 Stephen, Supra, n.7 at 151.

107 Id. 157.

108 Id. 135.

109 Hart, Supra, n.6 at 36.

110 Id. 37.

111 Devlin, Supra, n.8 at 130.

112 See Supra, 28.

113 Hart, Supra, n,6 at 69.

114 Id.

115 See Supra, 35-37 where it is questioned as to the extent to which exhortation is compatible with Mill's thesis.

116 Devlin, Supra, n.8.

117 Stephen, Supra, n.7.

118 Devlin, Supra, n.8 at 86 ff.

119 Id. 90. This expression of principle has attracted the criticism that in such a form, society's moral code may tend to become ossified and that virtually any change is thereby prevented. See Infra, 98-101 where this point is discussed.

120 Devlin, Supra, n.8 at 6-7.

121 Ison, The Enforcement of Morals (1967-68) 3 U.B.C. L. Rev. 263 at 265.

122 Rostow, The Enforcement of Morals (1960) 18 Camb. L.J. 174 at 197.

123 Devlin, Supra, n.8 at 7-8.

124 See Supra, 85 ff.

125 See Infra, 108.

126 Devlin, Supra, n.8 at 15. See also Devlin at 90-91.

127 Id. 16-20.

128 Id. 17.

129 Ginsberg, Law and Morals (1963-64) British Journal of Criminology 283 at 290.

130 Dworkin, Lord Devlin and the Enforcement of Morals (1965-66) 75 Yale L.J. 986 at 992.

131 Ison, (1967-68) 3 U.B.C. L. Rev. 263 at 266-267.

132 See Infra, 98 ff.

133 The example provided by Lord Devlin is of a hypothetical situation where one quarter or one half of a given community became drunk every night: Devlin at 14.

134 Hart, Supra, n.6 at 72.

135 See Supra, 100.

136 Devlin, Supra, n.8 at 125-126.

137 Id. 126.

138 Dybikowski, Law, Liberty and Obscenity (1972) 7 U.B.C. L.Rev. 33 at 52.

139 Hart, Supra, n.6 at 50-51.

140 For a general discussion on this area, see Milhollin, The Refused Blood Transfusion: an ultimate challenge for law and morals (1965) 10 Natural Law Forum 202.

141 A parallel line of reasoning could be adopted in a number of similarly problematic and undecided areas of which euthanasia is a signal example.

142 Hart, Supra, n.6 at 51.

143 Caron, The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy (1969) 15 McGill L.J. 9 at 29.

144 Mitchell, Supra, n.54 at 22.

145 Ten, Crime and Immorality (1969) 32 Mod. L. Rev. 648 at 662.

146 Devlin, Supra, n.8 at 113.

147 Id. 9.

148 Hart, Supra, n.6 at 70.

149 Hart, The Concept of Law at 189-193.

150 Hart, Positivism and the Separation of Law and Morals (1958) 71 Harv. L. Rev. 593.

151 Heuston, Morality and the Criminal Law, (1972) 23 Northern Ireland L.Q. 274 at 284.

152 Devlin, Supra, n.8 at 15.

153 See Supra, 91-92.

154 See Supra, 58.

155 Blackshield, The Hart-Devlin Controversy in 1965 (1965-67) 5 Syd. L. Rev. 441 at 449.

156 Caron (1969) 15 McGill L.J. 9 at 21.

157 Blackshield (1965-67) 5 Syd. L. Rev. 441 at 450.

158 Supra, n.10.

159 Supra, n.11.

160 Supra, n.7.

161 Supra, n.8.

162 Shaw v. D.P.P. Supra, n.10 at 267.

163 1 Sid. 168.

164 (1763) 3 Burr. 1435.

165 Id. 1438.

166 Shaw v. D.P.P. Supra, n.10 at 268.

167 Id. 283.

168 11th ed.

169 Shaw v. D.P.P. Supra, n.10 at 291 (Lord Morris).

170 Id. 275.

171 Id. 282.

172 Id. 292. See also Lord Hodson at 294.

173 Knuller v. D.P.P. Supra, n.11 at 910.

174 Goodhart, The Shaw Case: The Law and Public Morals (1961) 77 L.Q.R. 560 at 564-565.

175 Shaw v. D.P.P. Supra, n.10 at 292.

176 See Infra, 127 and Supra, 122.

177 Shaw v. D.P.P. Supra, n.10 at 275.

178 Infra, 130 and 137.

179 Knuller v. D.P.P. Supra, n.11 at 903.

180 Id. 918.

181 Id. 923.

182 Id. 929.

183 Id. 929-930.

184 Id. 910.

185 Hall Williams, The Ladies' Directory and Criminal Conspiracy: The Judge as Custos Morum (1961) 24 Mod. L. Rev. 626 at 631.

186 Elliott, Nulla Poena Sine Lege (1956) 1 Juridical Review N.S. 22 at 32-33.

187 H.M. Advocate v. Greenhuff and others (1838) 2 Swin. 236 at 271.

188 Elliott (1956) 1 Juridical Review N.S. 22.

189 See Supra, 122.

190 See Lord Reid at 905, Lord Morris at 911, Lord Diplock at 919, Lord Simon at 932 and Lord Kilbrandon at 937.

191 Mewett, The Proper Scope and Function of the Criminal Law (1960-61) 3 Criminal Law Quarterly 371.

192 Id.

193 Id. 387.

194 Id. 387-388.

195 Mewett, Morality and the Criminal Law (1961-62) 14 U.T.L.J. 213.

196 Id. 223.

197 Id. 225.

198 Supra, n.8 at 15 and 21.

199 Green, Law and Morality in a Changing Society (1970) 20 U.T.L.J. 422 at 436.

200 (1921) 58 D.L.R. 251.

201 Maclennan v. Maclennan [1958] S.L.T. 12.

202 The Times (London) 4 October 1969.

203 Id.

204 Supra, 139.

205 Caron (1969) 15 McGill L.J. 9 at 21.

206 Id.

207 For example, Stephen's conception of society and its moral mechanisms, is entirely different from Mill's. The former writer views social improvement as being a coercive process, whilst the latter regards social freedom as its indispensable preliminary.

208 Caron (1969) 15 McGill L.J. 9 at 36.

209 Id.

210 St. J. Stevas, Law and Morals at 17.

211 Id. 27.

212 See the Scandinavian Realists on this point, especially Olivecrona, Law as Fact at 151-156.

213 Ellul, Law as representation of value (1965) 10 Natural Law Forum 54 at 59.

214 Mewett, (1960-61) 3 Criminal Law Quarterly 371 at 372.

215 Ellul, (1965) 10 Natural Law Forum 54 at 60.

216 Gossett, The Law: leader or laggard in our society? (1965) 51 Am. Bar Assoc. J. 1131.

217 Id. 1134-1135.

218 Devlin, Supra, n.8 at 96.

219 Gossett (1965) 51 Am. Bar Assoc. J. 1131 at 1132.

220 Devlin, Supra, n.8 at 95.

221 See Supra, n.19 where an interesting instance of judicial conservatism is cited.

222 Waelder, Conflicts of values and moral dilemmas (1966-67) 38 Pennsylvania Bar Association Quarterly 410.

223 Id. 421.

224 See Supra, 32 ff.

225 Caron (1969) 15 McGill L.J. 9 at 33.

226 See Supra, 111-112.

227 Mill, Supra, n.5 at 214-215.

228 Dybikowski (1972) 7 U.B.C. L. Rev. 33 at 38.

229 Punzo (1973) 18 St. Louis University L.J. 175 at 181.

230 See Supra, 32 ff.

231 Id.

232 See Supra, 46-49.

233 See Supra, 29-30. Also 88-89.

234 Hart, Supra, n.6 at 5.

235 See Supra, 52-57.

236 Devlin, Supra, n.8 at 16.

237 See Supra, 92-97.

238 Hart, Supra, n.6 at 70.

239 See Supra, 10-19.

240 Supra, n.11.

241 Supra, n.10.

242 See Supra, 29-30. Also 88-89.

243 See Supra, 52-57.

244 Hart, Supra, n.6 at 70.

245 Devlin, Supra, n.8 at 123.

BIBLIOGRAPHY

BOOKS

DEVLIN, P. The Enforcement of Morals, Oxford University Press, 1965.

HART, H.L.A. The Concept of Law, Oxford University Press, 1961.
Law, Liberty and Morality, Stanford University Press, 1963.

MILL, J.S. On Liberty, London, 1859. Reprinted in Selected Writings of John Stuart Mill, edited M. Cowling, The New American Library, 1968.

MITCHELL, B. Law, Morality, and Religion in a Secular Society, Oxford University Press, 1967.

STEPHEN, J.F. Liberty, Equality, Fraternity, London, 1873. 2nd edition, edited R.J. White, Cambridge University Press, 1967.

STEVAS, N. St. J. Law and Morals, Hawthorn Press, 1964.

ARTICLES

BLACKSHIELD, A.R. The Hart-Devlin Controversy in 1965, (1965-67) vol. 5 Sydney Law Review, p.441.

BROWN, D.G. Drugs and the problem of law abuse, (1972) vol. 7 University of British Columbia Law Review, p.1.

CARON, Y. The legal enforcement of morals and the so-called Hart-Devlin Controversy, (1969) vol. 15 McGill Law Journal, p.9

DWORKIN, R. Lord Devlin and the Enforcement of Morals, (1965-66) vol. 75 Yale Law Journal, p.986.

DYBIKOWSKI, J.C. Law, Liberty and Obscenity, (1972) vol. 7 University of British Columbia Law Review, p.33.

ELLIOTT, W.A. Nulla Poena Sine Lege, (1956) vol. 1 Juridical Review, New Series, p.22.

ELLUL, J. Law as representation of value, (1965) vol. 10 Natural Law Forum, p.54.

GINSBERG, M. Law and Morals (1963-64) British Journal of Criminology, p.283.

GOODHART, A.L. The Shaw case: the Law and Public Morals, (1961) vol. 77 Law Quarterly Review, p.560.

GOSSETT, W.T. The Law: leader or laggard in our society? (1965) vol. 51 American Bar Association Journal, p.1131.

GREEN, L.C. Law and Morality in a changing society, (1970) vol. 20 University of Toronto Law Journal, p.422.

HART, H.L.A. Positivism and the Separation of Law and Morals, (1958) vol. 71 Harvard Law Review, p.593.

HEUSTON, R.F.V. Morality and the Criminal Law, (1972) vol. 23 Northern Ireland Law Quarterly, p.274.

ISON, T.G. The Enforcement of Morals, (1967-68) vol. 3 University of British Columbia Law Review, p.263.

MERRILLS, J.G. Law, Morals, and the Psychological Nexus, (1969) vol. 19 University of Toronto Law Journal, p.46.

MEWETT, A.W. The proper scope and function of the criminal law, (1960-61) vol. 3 Criminal Law Quarterly, p.371. Morality and the Criminal Law (1961-62) vol. 14 University of Toronto Law Journal, p.213.

MILHOLLIN, G.L. The refused blood transfusion: an ultimate challenge for law and morals, (1965) vol. 10 Natural Law Forum, p.202.

PUNZO, V.C. Morality and the law: the search for privacy in the community, (1973) vol. 18 St. Louis University Law Journal, p.175.

ROSTOW, E.V. The Enforcement of Morals, (1960) vol. 18 Cambridge Law Journal, p.174.

SAMEK, R.A. The Enforcement of Morals. A basic re-examination in its historical setting, (1971) vol. 49 Canadian Bar Review, p.188.

TEN, C.L. Crime and Immorality, (1969) vol. 32 Modern Law Review, p.648.

WAELDER, R. Conflicts of values and moral dilemmas, (1966-67) vol. 38 Pennsylvania Bar Association Quarterly, p.410.

WILLIAMS, J.E.H. The Ladies' Directory and criminal conspiracy: the judge as custos morum, (1961) vol. 24 Modern Law Review, p.626.

GOVERNMENT PAPERS

Home Office and Scottish Home Department Report of the Committee on Homosexual Offences and Prostitution, 1957, (Wolfenden Report) Cmnd. 247.

Report of the Canadian Committee on Corrections. Towards Unity: Criminal Justice and Corrections, 1969, (Ouimet Report).

The Criminal in Canadian Society: A Perspective in Corrections, 1973.

CASES

H.M. Advocate v. Greenhuff and others (1838) 2 Swin. 236.

Benyon v. Nettlefold (1850) 3 Mac & G 94.

Blachford v. Preston (1799) 8 Term Rep. 89.

Klippert v. The Queen (1967) S.C.R. 822.

Knuller (Publishing, Printing and Promotions) Ltd. v. D.P.P. [1972] 2 All E.R. 898.

Maclennan v. Maclennan [1958] S.L.T. 12.

Orford v. Orford (1921) 58 D.L.R. 251.

R. v. Deleval et al. (1763) 3 Burr. 1435.

R. v. Harrison The Times (London) 4 October 1969.

R. v. Sidley 1 Sid. 168.

Shaw v. D.P.P. [1962] A.C. 220.